



# **ANNUAL REPORT**

**for the period January 1, 2003 to December 31, 2003**

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



# **ANNUAL REPORT**

for the period **January 1, 2003 to December 31, 2003**

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



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

March 10, 2004

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, 2003 to December 31, 2003.

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

---

## TABLE OF CONTENTS

Introduction .....	1
Review Officer's Message	
Access to Information .....	1
1. Fees .....	1
2. Routine Access .....	1
3. The Report of the Review Committee .....	2
4. Relationship Between the Review Office and Government .....	2
Privacy .....	3
1. Personal Information Protection and Electronic Documents Act .....	3
2. Personal Health Information .....	3
3. No Independent Oversight Over Personal Privacy Protection .....	3
4. Video Surveillance .....	4
The Review Officer to be Accountable to the Legislature .....	5
Mediation .....	5
Activities of the Review Officer in 2003 .....	5
Recommended Changes to the Legislation .....	6
Summaries of Selected Reviews and Mediations .....	6
1. Reviews .....	6
2. Mediations .....	9
Summary of 2003 Nova Scotia FOIPOP Court Cases .....	10
Staff .....	12
Financial Information .....	12
1. Travel Costs .....	12
Statistics .....	13

## INTRODUCTION:

The annual report of the FOIPOP Review Office 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.) 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, following 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:

### ACCESS TO INFORMATION:

#### *Fees:*

The FOIPOP Act, described by the Supreme Court of Nova Scotia as an important part of the democratic process, is in poor health in Nova Scotia and this is unfortunate. It is, in my view, a direct result of the new fees for applications and appeals set in 2002. The statistics for 2003, the first full year with increased fees, show that the number of applications for information to government departments is down by 278 or 28% from 2002. The number of appeals received by this office is down to the levels of 1995, the year the Review Officer was appointed. In 2003 we received 87 fewer appeals than we did in 2001 (57%) and 46 fewer than in 2002 (41%).

It is not reasonable to conclude that the drop in applications and requests for review represents a screening out of frivolous applications.

I don't think the government intended this result. I believe all governments, of whatever political stripe, know that openness and accountability are essential to good government and that the public wants no less. The new fees have obviously put the cost of accessing government information beyond the reach of many Nova Scotians. Government is consequently becoming less open and less accountable.

I trust the government will recognize this and return to the original \$5.00 fee for application, with no fee for an appeal to the Review Officer.

An interesting comment from an applicant is worth repeating here: "I pay \$25.00 to make an application, get nothing, pay another \$25.00 for a Review and even if the Review Officer recommends I get the records I asked for, I may still get nothing. \$50.00 for nothing."

#### *Routine Access:*

In my last Annual Report, tabled in March, 2003, I welcomed the Government's decision to adopt a "Routine Access" policy. The Government intends to identify certain records as available, on request, to the public, without the requirement of a formal application under the FOIPOP Act.

The Review Office was provided with the draft guidelines for the policy and offered its comments.

The FOIPOP Co-ordinator for the Department of Justice reports that all Government Departments and a great majority of agencies, boards and commissions have adopted routine access policies and most of them are located on their web sites.

I hope that, as their experience with routine access grows, Departments will look at adding more

records to the list and make them accessible without a request. Web sites are an excellent venue for listing what records are available to the public.

### ***The Report of the Review Committee:***

The Review Officer made four submissions to the Committee appointed by the Minister of Justice to review the FOIPOP Act. I also appeared before the Committee. The submissions and the Review Officer's response to the Committee's report can be found on our Web site, [www.foipop.ns.ca](http://www.foipop.ns.ca), click on "Publications."

The Committee held public meetings, and received 21 written submissions which were made public through the Department of Justice's Web site.

In my response to the Committee's report, I noted that many of the recommendations would, if adopted, be very helpful in promoting open and accountable government. However, in my view, there was insufficient analysis or reasoning attached to many of the recommendations to allow for more substantial comment.

The following are my comments on some of the recommendations:

- I expressed disappointment that the Committee, while recognizing that issues of personal privacy are becoming increasingly important to Canadians, chose not to examine thoroughly, and recommend on personal privacy protection, despite its clear mandate to do so. (The Committee had been asked by the Minister to "specifically review the adequacy of the privacy protection provisions of the legislation.") Instead, the committee recommended the government consider establishing another committee to review personal and business privacy issues.

If the Government decides to act on this recommendation, I hope it will do so sooner rather than later. Personal privacy protection is becoming a major concern of Canadians.

- The Committee recommended the government consider establishing a separate office to investigate privacy complaints. If this recommendation is adopted, Nova Scotia would be the only province to separate access and privacy oversight. The Committee did not explain why it believes separate offices are appropriate.

At the federal level, there are two Offices. The Federal Information Commissioner, in a 2003 position paper, said "(t)he single-agency model of oversight of access and privacy rights is a proven approach" while the dual-agency model has given rise to real problems, including 'conflicting advice to Parliament'. Access and privacy go hand in hand. The protection of personal privacy is a mandatory exemption in all access legislation in the country.

- I welcomed the recommendation that the \$25.00 fee for making a request for a review to the Review Officer be dropped, but I maintained that the \$25.00 application fee should be returned to \$5.00.

### ***Relationship Between the Review Office and Government:***

In my last Annual Report, I urged the Government to adopt a more cooperative relationship with the Review Office.

In the past year, this Office made a number of efforts to build a more amicable and fruitful relationship with the Government.

- The Deputy Minister of Justice accepted my invitation to meet with the staff during a session organized by the Justice Learning Centre. The Department of Justice is responsible for the implementation and the administration of the FOIPOP Act. The meeting gave us an opportunity to talk about the administrative needs of the Review Office and how we saw our future, particularly with the growing concerns of Nova Scotians for their personal privacy. The independence of the FOIPOP Office, recognized by all parties, is not compromised by such meetings.
- Our mediator met with the Government FOIPOP Co-ordinator to discuss working collaboratively on projects. One such project is developing *Privacy Impact Assessments* which are designed to assist public bodies identify what personal information is or will be collected by a public body and the possible uses of the personal information, and specify who will have access to the personal information of others and under what circumstances.

- The Office invited all FOIPOP Administrators to a modest reception in our new office.
- The Office offered to meet with new FOIPOP Administrators to give them an opportunity to learn more about our processes.

## PRIVACY

### *Personal Information Protection and Electronic Documents Act:*

Nova Scotia, like seven other provinces and the three territories, chose not to pass their own “substantially similar” personal privacy legislation for the private sector. Quebec has had similar legislation for some time. Alberta and British Columbia chose to pass their own legislation before PIPEDA came into force in the provinces and territories on January 1, 2004.

Alberta’s Government Services Minister, in announcing the Government’s decision to adopt its own private sector personal privacy protection legislation, said that by implementing its own law, privacy complaints could be addressed by Alberta’s Information and Privacy Commissioner instead of the Federal Privacy Commissioner.

Although the Nova Scotia private sector appears to favour a pan-Canadian, harmonized law, a provincial law may modify the “consent” needs in a way more favourable to the private sector. British Columbia boasts that personal information in that jurisdiction is now treated the same no matter who has custody or control of it. Nova Scotia’s own privacy legislation for the private sector could also extend privacy coverage to those citizens who are not covered by PIPEDA, or by existing access and privacy legislation, i.e. non-profit organizations. I encourage the government to consider developing its own private sector privacy legislation and create a law sensitive to the needs of Nova Scotia.

### *Personal Health Information:*

The Provinces of Manitoba, Saskatchewan and Alberta decided that the protection of individuals’ personal health information required separate legislation. British Columbia’s private sector privacy legislation also applies to personal health information. A made-in-Nova Scotia health information protection act, if its provisions are deemed substantially similar to those in PIPEDA, could provide more comfort to health care providers and citizens alike.

### *No Independent Oversight Over Personal Privacy Protection:*

In my two previous Annual Reports, I spoke of the need for independent oversight over the personal privacy protection obligations which the Acts impose on public bodies and municipalities. Section 20 of the Provincial Act (the protection of personal privacy) is an exemption tied to access. The Review Office reviews decisions made using the s.20 exemption. But sections 24 to 31 lay down rules for public bodies to follow in the collection, use and disclosure of personal information. (The Municipal Government Act has similar language). The Review Officer has no power to investigate complaints over those sections. This lack of independent oversight renders the lofty purposes of the FOIPOP Act meaningless. Section 2 of the FOIPOP Act sets out its main purposes. Among them is to “*protect the privacy of individuals with respect to personal information about themselves held by public bodies*” and to ensure that public bodies are fully accountable to the public by “*preventing the unauthorized collection, use and disclosure of personal information by public bodies*”.

The Act lays down rules for public bodies to follow but there is nothing an aggrieved party can do if the rules are not followed. There is no recourse through an independent body. There is a complaint mechanism to the Federal Privacy Commissioner for individuals who feel their privacy has been breached by a federal public body, and for those with a complaint against the private sector, but no such mechanism for privacy complaints against a provincial public body. There is no other Information and Privacy Commissioner in the country who doesn’t provide oversight over the collection, use, and disclosure of personal information. Nova Scotians deserve the same rights as other Canadians.

In the absence of any independent oversight, the Review Officer has undertaken privacy complaints on request and most public bodies co-operate. However, as a result of the omission in the Act, two important public bodies, Dalhousie University and the Halifax Regional Police, have declined to participate in reviews of privacy complaints, citing the lack of legislated authority of the Review Officer.

### ***Dalhousie's attempts to curb student rowdiness off campus***

The two public bodies which have refused to participate in investigating privacy complaints were the two parties involved in a matter which drew considerable public attention in the fall of 2003.

Dalhousie University issued a media release in November to say it was introducing "a proactive process that will hold students directly accountable for their behaviour towards neighbours in their community."

Dalhousie said it had asked the police, when investigating unruly behaviour of students, to provide the University with the addresses where the unruly behaviour occurred. It promised "there will be actions taken toward those who are investigated by" the police.

Students complained that the actions of the University and the police constituted an unreasonable invasion of privacy and asked for my views.

I concluded that the University was "collecting" personal information in contravention of section 24(1) of the FOIPOP Act, and that the police were disclosing personal information in contravention of section 485(2) of Part XX of the *Municipal Government Act*.

The police subsequently said it had suspended providing addresses to the University. Dalhousie said it would continue its efforts to sanction students investigated by the police. (Those wishing to read a more detailed account are directed the FOIPOP Review Office Web site, [www.foipop.ns.ca](http://www.foipop.ns.ca), under Publications).

At the time of writing this report, I do not know if the police have reinstated the practice or if the university is continuing to collect student information for law enforcement purposes which is outside their mandate.

### ***Video Surveillance:***

The media drew public attention to the use of video surveillance to cut down on crime. The Review Officer was asked for his views. In an Op-Ed piece in the Chronicle Herald, I listed guidelines for public bodies to use when determining whether to install video surveillance cameras in public places. These guidelines reflect the requirements of the FOIPOP Act:

- Video surveillance should be used as a last resort. Other measures of deterrence should be used first.
- Police should be prepared to justify the use of cameras on the basis of verifiable, specific reports of incidents of crime.
- An assessment should be made of the actual and potential effects video surveillance would have on peoples' privacy.
- Extensive consultations should be held with citizens.
- A rationale for the surveillance should be provided to the citizens.
- Reasonable and adequate warning should be given when video surveillance begins.
- Assurances should be provided that access to the monitors, or to video tapes, is restricted to properly authorized persons.

I quoted former Justice Gerald La Forest of the Supreme Court of Canada who said, thirteen years ago:

"To permit unrestricted video surveillance by agents of the state would seriously diminish the degree of privacy we can reasonably expect to enjoy in a free society . . . We must always be alert to the fact that modern methods of electronic surveillance have the potential, if uncontrolled, to annihilate privacy."

*Privacy International*, a privacy rights organization, wonders whether, if we become desensitized to video surveillance, will we soon accept other forms of surveillance?

Despite the alacrity with which some police and town councils espouse video surveillance, the literature shows there is little evidence that it works as a crime deterrent.

## THE REVIEW OFFICER TO BE ACCOUNTABLE TO THE LEGISLATURE:

I have not been successful as yet in persuading government to have this Office report to the legislature as do similar offices across the country. This would not only enhance the independence of the Review Office, but would allow legislators and the Review Officer to interact through a committee of the House. The legislature has already passed important amendments to the Act in this direction: the Review Officer has a term appointment of five to seven years; he is obliged to provide an annual report to the legislature; and the Review Officer can only be removed from office following a vote of the majority of the Members of the House. The next step is to make the Review Office accountable to the legislature, as other federal, provincial and territorial independent oversight officers are. The Review Office must be accountable to the public and can only do so through the legislature.

## MEDIATION:

The settling of review requests through the mediation process is the preferred method of dispute resolution at the Review Office.

The percentage of files closed in 2003 through mediation remains steady at 30%. However, another 21% of files were closed through a combination of mediation and review.

The mediation process at the Review Office continues to be an informal process largely based on mediator initiated telephone calls with the parties. However, there has been an increasing use of face to face meetings.

Mediation at the Review Office usually follows the interest-based problem-solving approach in which the needs and interests underlying parties' positions are identified with a view to developing solutions that address and accommodate as many of those needs and interests as possible. However a rights- or entitlement-based approach whereby the mediator provides a legal opinion to the parties regarding their chances of success should the matter go to review is also employed where appropriate.

The Review Office continues to hear expressions of satisfaction from applicants and public bodies alike when a file is closed by way of a mediated agreement.

## ACTIVITIES OF THE REVIEW OFFICER IN 2003:

In February, along with other provincial information and privacy commissioners, the Review Officer wrote to the Chair of Parliament's Standing Committee on Citizenship and Immigration expressing his views on the proposed introduction of ID cards for all Canadians. In August, he wrote a similar letter to the Honourable Denis Coderre, the Minister of Citizenship and Immigration.

The Review Officer appeared before the Committee appointed to review the FOIPOP Act.

On April 30, in Toronto, the Review Officer appeared on a panel organized by the Federated Press to discuss the provincial reaction to the *Personal Information and Protection of Electronic Documents Act* (PIPEDA).

In June, the Review Officer appeared on a similar panel on PIPEDA in Halifax, organized by Lancaster House, the publisher of books and newsletters on labour and employment law.

In May, he attended the annual meeting of provincial, territorial and federal information and privacy commissioners in Quebec City.

In August, after receiving complaints that landlords were asking would-be tenants for their Social Insurance Numbers for credit checks, the Review Officer wrote to the Investment Property Owners' Association of Nova Scotia, advising against the practice.

In October, the Review Officer attended the provincial, territorial and federal privacy commissioner's meeting in Ottawa.

In November, the Review Officer spoke on privacy protection to the Association of Municipal Administrators in Halifax.

In November, the Review Officer wrote an Op-Ed piece for the Chronicle Herald in response to a recent editorial on video surveillance.

Through the year, the Review Officer engaged in a public debate on the privacy implications of video surveillance in public areas.

## RECOMMENDED CHANGES TO THE LEGISLATION:

In my last annual report, I made 17 recommendations for changes which I feel will improve the FOIPOP Act. (Readers can find our past annual reports and this one on our Web site: [www.foipop.ns.ca](http://www.foipop.ns.ca) under "Publications".) I will not repeat all of them here though I would hope that if government decides to act on some of them, the Review Office will be consulted.

- Granting the Review Officer the explicit powers to investigate privacy complaints is even more important now than it was a year ago. The refusal of two important public bodies, Dalhousie University and the Halifax Regional Police, to participate in a privacy inquiry speaks to the urgency of this amendment. These public bodies are responsible for the personal information of thousands of people.
- To enhance the independence of the Review Officer and for purposes of accountability, the Review Officer should report to the legislature.
- Return the fees for using FOIPOP to where they stood before 2002.
- Mandate the Review Officer to inform the public. This mandate is found in other provincial and territorial legislation.
- Require that the names of applicants be contained and disclosed only to those who need to know, i.e. those who must search or research while processing the application. If the decision maker is not the person who received the application, she/he does not need to know the identity of the applicant.
- The Review Officer needs the power to delegate members of staff to review all documents related to an application.
- Public bodies should be required to consult with the Review Officer when creating new policies related to the FOIPOP Act.
- The same penalty imposed for misleading an applicant should be imposed for misleading the Review Officer.

## SUMMARIES OF SELECTED REVIEWS AND MEDIATIONS:

### REVIEWS:

#### *FI-03-05 (Proof of significant harm)*

An Applicant wanted records regarding the operations of Orenda Recip Inc., an aircraft manufacturing plant which wound down its operations. The government wrote down a \$9.3 million royalty loan. The Office of Economic Development (OED) provided some records, in their entirety or severed. For the remainder, it cited exemptions under sections 14(1) (advice); 20(1) (disclosure of personal information); and 21(1) (confidential information of a third party).

To support its decision to sever information from a briefing note, under s.14(1), the OED sought support in *Fuller v. the Queen* which cited *O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat)* in which the Nova Scotia Supreme Court, sitting as a Chambers Judge, considered the meaning of "advice" in s.13(1) and concluded that "advice is part of the deliberative process" and generally pertains to a suggested course of action.

On this matter, the Review Officer concluded that while the OED cited the Chambers court definition, it did not recognize that this was appealed to the Nova Scotia Court of Appeal and that the Appeal Court judge said he did not endorse the "judge's reflection on the meaning of 'advice'."

The Review Officer concluded that while the briefing note in question contained some "views" and "opinions," most of it contained facts which meet the definition of "background information" and should

be disclosed in accordance with s.14(2).

With respect to s.21(1), the Review Office decided that the OED had not argued successfully that “significant” harm to the third party would result from disclosure because most of the figures given were five years old.

The Review Officer recommended more disclosure after concluding that “a company doing business with the government cannot expect important details of any agreement to be kept confidential”

The Office of Economic Development accepted the Review Officer’s recommendations in part.

### ***FI-03-09 (Unreasonable invasion of privacy)***

The applicant asked for documents regarding the resignation of the former CEO of the IWK Hospital. The CEO, whose resignation from the IWK was accepted by its Board, was later appointed CEO of the Queen Elizabeth II Health Sciences Centre. The IWK claimed the records contained personal information and were exempt from disclosure under s.20(1) because disclosing them would constitute an unreasonable invasion of the former CEO’s personal privacy. Later, the IWK added more exemptions: s.4A(1) and (2) which addresses issues of paramountcy; 19(D) (records arising out of a study, research or program); s.14(1) (advice) and s.16 (solicitor-client privilege).

Though it cited exemptions, it also argued that the information being sought was not subject to the FOIPOP Act. Section 71 of the Hospitals Act overrides the FOIPOP Act. It reads:

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

The Review Officer agreed with the Applicant’s argument that section 71 of the Hospitals Act is designed to protect the health records of patients, not the records of employees.

The Review Officer concluded that the IWK decision and the Review rested on s.20(1). He concluded that disclosing information about the resignation of the CEO, given the IWK’s obligation to be fully accountable to the public, would not be an unreasonable invasion of personal privacy.

The Review Officer recommended that IWK provide the Applicant with portions of three records which had been denied in their entirety.

The IWK accepted the Review Officer’s recommendations.

### ***FI-03-13 (Privacy rights of the deceased)***

An Applicant wanted copies of all records and reports concerning the death of her daughter at a young students’ residence. The Department provided most of the records but severed a review of Child Welfare files and cited two exemptions: section 14(1), which allows a public body to deny access to records containing advice to a minister or public body; and section 20(1), which requires public bodies to refuse to disclose personal information if doing so would be an unreasonable invasion of a third party’s personal privacy. With s.20(1), the Department had in mind the privacy rights of other residents of the home, and others, who provided witness statements.

The Review Officer noted that the Department had not addressed the privacy rights of the deceased student. It was his view, supported by section 30(c) of the FOIPOP Act, that the deceased have the right to privacy. Section 43 of this Act reads that any right or power of the deceased can be exercised by the deceased’s personal representative if the exercise relates to the administration of the deceased’s estate. He concluded that although the applicant was the “next of kin” to the deceased and the deceased was a dependent, the applicant was not dealing with the administration of an estate.

The records met the definition of personal information because they related to “health care history” (see section 20(3)(a)).

In considering subsection 20(2), the Review Officer concluded that although the Department had a responsibility to ensure the safety and security of the students it supports, this obligation does not outweigh privacy rights in this case.

With respect to s.14(1), a discretionary exemption, the Review Officer concluded that the Department did not demonstrate how it used its discretion in determining to cite the “advice” exemption. Not to have used discretion meant, in the view of the Review Officer, that the Department had used a “blanket” approach to the exemption.

The Review Officer recommended the disclosure of more parts of the severed records. He also expressed concern about the inability, under the law, of immediate family members to obtain all information about the circumstances of a relative’s death.

The Review Officer’s recommendations were accepted.

### ***FI-03-26 (Harm to a third party)***

A third party objected to a decision of the Department of Environment and Labour to disclose a copy of an environmental assessment report commissioned by an oil company. The third party asked for a review of the decision citing the mandatory exemption in section 21(1) which protects from disclosure the confidential information of third parties when three conditions are met.

The third party believes it met those conditions:

- (a)(ii) the report contains scientific and technical information of the third party;
- (b) the report was provided to the Department in confidence and;
- (c)(ii) disclosure could reasonably be expected to result in similar information no longer being provided to the Department.

All three parts of this exemption have to be met for it to stand.

The third party also said it did more than the Environment Act requires when it voluntarily provided the Department with a copy of the soil assessment report.

The Department submitted that it agreed with the third party that the report contains technical information and was provided in confidence, but it does not agree that disclosing the report would result in depriving the Department of other soil assessment reports.

The Applicant, in his submission to the Review Officer, argued that the Environment Act required the third party to provide the Department with the report.

The Review Officer recommended the Department disclose records at issue having concluded that while the oil company provided the report to the Department voluntarily, it could have been ordered to do so.

The Review Officer confirmed the right of the Department to disclose the report.

The Department of Environment and Labour accepted the Review Officer’s recommendations.

### ***FI-03-44 (Peer review)***

The family of a man who died during surgery at the Queen Elizabeth II Health Science Centre was denied access to a copy of a review of the death.

While there was some disagreement between the parties over the particulars of the events, they agreed that the family had asked for a review of the circumstances of the father’s death and that the hospital agreed. The family was later told the review was being done.

In denying access to the report, the hospital cited exemptions under section 16 (solicitor-client privilege) and section 19(D) which allows the hospital to

“...refuse to disclose to an applicant a record of any report, statement, memorandum, recommendation, document or information that is used in the course of, or arising out of, any study, research or program carried on by or for (the hospital) ... for the purpose of education or improvement in medical care or practice.”

According to the hospital, “Capital Health (the Capital District Health Authority) was instructed by its solicitor to undertake an investigation into the circumstances surrounding (the patient’s) medical problems and his death as it was determined that litigation was highly probable given the concerns expressed by the . . . family.”

The family was provided with a summary of the report.

In its response, the hospital said the family could not have a copy of the report because “the review

was initiated at the request of the lawyers for the Capital District” who wanted to know what happened in the father’s case.

In its appeal to the Review Officer, the family maintained that the review of the father’s death was not performed “in the course of a study being carried on by a hospital” but was done at the request of the family.

In his conclusion, the Review Officer said that the exemptions cited appear to be contradictory. He said: “While the Hospital claims the report is denied under s.16 because it was initiated ‘in contemplation of litigation’,” it also claims it was prepared “for the purpose of education or improvement in medical care or practice” [s.19(D)].

The claim of s.19(D) resulted in a lengthy discussion about the meaning of “peer review.” The Review Officer noted that the Nova Scotia Supreme Court had drawn “a distinction between investigations of particular incidents which are to become the subject of litigation as opposed to information gathered by a review committee for the purpose of studying and evaluating hospital care and practice for improvement purposes.”

The Review Officer concluded that the report was not a “peer review” because it was initiated, according to the hospital, predominantly “in contemplation of litigation” and that it could not be denied under s.16 because “at the time it was initiated, there could be no ‘reasonable’ expectation of litigation.”

The Review Officer recommended that the hospital release to the family of the deceased the six page factual report (which was part of the complete report) with names severed, and a written summary of the evaluation part of the report.

The Review Officer’s recommendations were accepted.

## **MEDIATIONS:**

### ***FI-03-28 (Department of Community Services)***

The applicant asked the Department of Community Services for her own personal information and the personal information of her minor child. The Department released some information but severed information concerning the child and another third party.

During discussion with the applicant, the mediator determined the applicant had joint custody of the child pursuant to a Court order. The mediator relayed this information to the Department along with a copy of the order and the Department agreed to release the child’s information to the applicant. The mediator then met with the applicant and provided an opinion that it was unlikely she would receive the third party’s information since it may well be considered an unreasonable invasion of that person’s personal privacy. The applicant agreed and withdrew the balance of her review request.

### ***FI-03-36 (Department of Agriculture and Fisheries)***

The applicant asked the Department of Agriculture and Fisheries for records concerning inspection reports on restaurants and eating establishments in the Halifax Regional Municipality for the most recent 2 years. The Department had difficulty responding to the request due to the way the information had been collected and recorded.

There had been discussions between the applicant and the Department prior to the matter coming to the Review Office. Through mediation, these discussions continued. The applicant met with an official with the Department of Agriculture and Fisheries who explained what type of records the Department had, what could realistically be provided and what the Department would sever. The mediator then met with the applicant to discuss the file and an agreement was reached to further refine the request for records.

The Department was satisfied with the revised request as it answered concerns they had about disclosing certain information. They provided the applicant with the revised information she was seeking and the applicant was satisfied. The matter settled in full.

***FI-03-49 (Department of Transportation and Public Works)***

The applicant asked the Department of Transportation and Public Works for a copy of an Engineering Practice Report carried out with respect to a fatal highway accident. The Department refused to provide the report arguing the report was protected under solicitor-client privilege and expectation of litigation.

The mediator investigated the matter and confirmed there was litigation in place as a result of the accident. The mediator obtained written correspondence from the Department indicating that the report had been requested by a solicitor for the Department.

In discussions with the mediator, the Department advised that the report would be released once the litigation was settled.

The mediator discussed the matter with the applicant and provided an opinion that the record was properly protected under solicitor client privilege. On the basis of that opinion and the fact that the Department had agreed to release the report once the lawsuit was settled, the applicant agreed to withdraw his request.

**SUMMARY OF 2003 NOVA SCOTIA FOIPOP COURT CASES:*****French v. Dalhousie*, 2003 NSCA 16**

This case wound it's way from the Review Office to the Nova Scotia Supreme Court and then to the Court of Appeal. It is interesting to note that the Court of Appeal went further in its decision on disclosure than the disclosure recommended by the Review Officer. Dalhousie University appealed a 2002 decision by Justice Gerald Moir of the Nova Scotia Supreme Court. In that decision, Justice Moir ordered the disclosure of written submissions provided in connection with the first-term survey and the departmental survey of the Department of Physiology and Biophysics at the Dalhousie Medical School in 2000 to the respondent, Dr. French.

Dr. French was then head of the Department and was nearing the end of his first five year term. The report of the survey committee was critical of Dr. French.

In its decision, the Court of Appeal clarified the definition of personal information as set out in s.3(1)(i)(viii) and (ix) of the Act. These sections read as follows:

*s.3(1) In this Act:*

- (i) "personal information" means recorded information about an identifiable individual, including (viii) anyone else's opinions about the individual, and*
- (ix) the individual's personal views or opinions except if they are about someone else;*

The Court of Appeal interpreted s.3(1)(i)(vii) as meaning that recorded information about Dr. French, including anyone else's opinion about Dr. French as it might appear in the written submissions, is the personal information of Dr. French. Those opinions are not the personal information of the authors of those opinions. This interpretation is reflected in s.3(1)(i)(ix).

The Court ruled that views and opinions about Dr. French should be disclosed to him as well as any assertions of fact made about him. The Court went on to say that the names of the authors of the opinions about Dr. French should also be disclosed. The Court held this was appropriate as Dr. French had met the burden of establishing that disclosure of this type of information would not constitute an unreasonable invasion of someone else's privacy because the information was necessary to a full understanding of the opinions and assertions of fact made about him.

***Postscript:***

This decision caused consternation both inside and outside the university community. The issue of this type of information being disclosed was subsequently raised in submissions to the Review Committee examining the Act. In its final report, the Review Committee made the following related recommendation:

*A provision be added to the Act that exempts information used to determine eligibility for employment or promotion, provided a summary of the performance of an individual as a candidate is given to that individual if requested.*

### ***Fuller v. The Queen, 2003 NSSC058***

This case arose from a request by the official opposition party, the NDP, for access to all records related to the decision of the government to raise fees charged for accessing information under the *Freedom of Information and Protection of Privacy Act*.

Portions of the records were disclosed but severances were made under sections 13, 14 and 16 of the Act. The matter had a formal review with the Review Office and when the Department of Justice refused to follow the recommendations of the Review Officer the applicant appealed to the Supreme Court.

The Court reviewed the approach to interpreting the Act and noted that Nova Scotia has a more unique and open FOIPOP Act than any other provincial jurisdiction. The Court observed that the Act ought to be “interpreted liberally so as to give clear expression to the Legislature’s intent that such positive obligations would enure to the benefit of good government and to its citizens.”

The Court examined the exemption sections cited and confirmed many of the severances but ordered the Department of Justice to disclose other previously severed records.

### ***Chesal v. Attorney General of Nova Scotia, 2003 NSCA 124***

The Court of Appeal heard this case on appeal from a decision of Justice Richard Coughlan reported as *Chesal v. Nova Scotia (Attorney General) (2003), 211 N.S.R.(2d)321*.

The Applicant sought the release of an Audit Report containing a review of the state of policing services provided by the Tribal Police of the Unama’ki Communities entitled, “Unama’ki Tribal Police Focus Audit 1999.” The Department of Justice denied access in full citing section 12(1)(a)(iii), 12(1)(b), and 12(2) and in part according to section 20(1).

In his review, the Review Officer determined that no evidence of significant harm had been presented and recommended the Audit Report be disclosed. The four Band Councils comprising the Unama’ki Communities appealed to Justice Coughlan of the Nova Scotia Supreme Court. Justice Coughlan agreed with the Review Officer and the Band Councils appealed to the Court of Appeal.

This case is interesting because it is the first time section 12 has been considered by the Court of Appeal and also because of the comments the Court made about evidence and proof of harm. The Court said that “the legislators, in requiring “a reasonable expectation of harm,” must have intended that there be more than a possibility of harm to warrant refusal to disclose a record.”

The Court went on to comment on the cogency of the evidence required and found that in this case the appellants had offered no evidence of a reasonable expectation of harm arising from the disclosure of the information.

On section 12(1)(a), the Court commented that it clearly does not establish a class exemption from disclosure for all information flowing between governments.

The Court of Appeal confirmed the lower Court’s decision and ordered the Audit Report disclosed.

**STAFF:**

Darce Fardy	Review Officer
Susan Woolway	Mediator/Investigator
Wendy Johnson	Case Review Analyst (on leave)
Crystal Taylor	Case Review Analyst (on secondment from Department of Justice)
Nathalie Poirier	Assistant to the Review Officer for services in French

With the assistance of the federal Department of Canadian Heritage and the Nova Scotia Office of Acadian Affairs, the Review Office can now offer services to the public in both official languages. Nathalie Poirier of Cheticamp, N.S. joined the Office in late 2003. The assistance to allow the Office to provide this service is under the Canada-Nova Scotia General Agreement on Promotion of Official Languages.

To replace our Case Review Analyst for one year, the Office was able to second Crystal Taylor from the office of the FOIPOP Co-ordinator at the Department of Justice. We thank the Co-ordinator for his assistance and Crystal for joining us on secondment.

**REVIEW OFFICE FINANCIAL INFORMATION:**

**TRAVEL COSTS:**

*The Review Officer:*

- To Toronto to join a panel discussion on the effects of PIPEDA on the provinces \$793.88
- To Quebec City for annual meetings of Information and Privacy Commissioners \$1561.74
- To Ottawa for meetings with the Interim Privacy Commissioner \$561.87

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

Compensation of the Review Officer: \$150.00 a day for days worked.

The detailed expenses for the fiscal year 2003-2004 will be posted later on the Review Office's Web site.

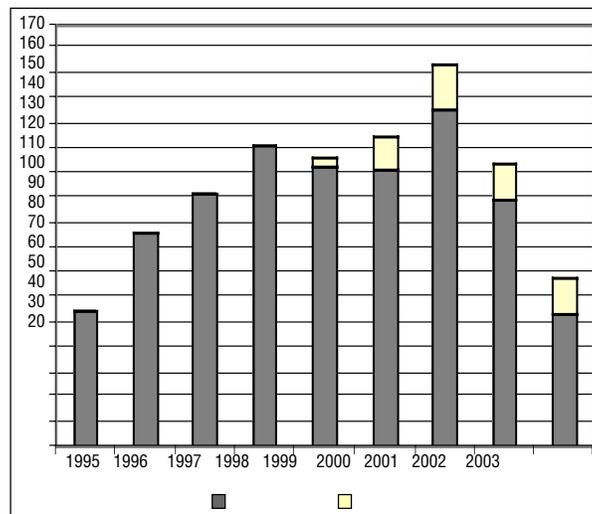
**STATISTICS**

**TABLE 1: ANNUAL REQUESTS FOR REVIEW OPENED**

	1995	1996	1997	1998	1999	2000	2001	2002	2003
<b>Provincial</b>	54	86	102	122	112	111	136	99	53
<b>Municipal</b>	0	0	0	0	4	14	18	14	14
<b>Total</b>	54	86	102	122	116	125	154	113	67

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.

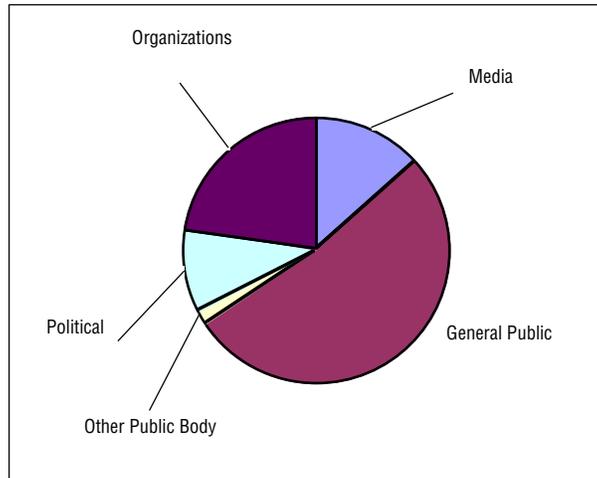
**CHART 1: Annual Requests for Review**



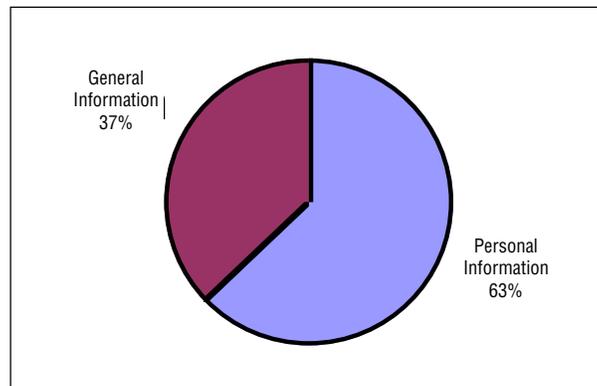
**TABLE 2: 2003 REQUESTS FOR REVIEW OPENED BY APPLICANT GROUP**

Media	General Public	Political	Interest Groups	Organizations	Other Public Body	Total
9	35	7	0	15	1	67

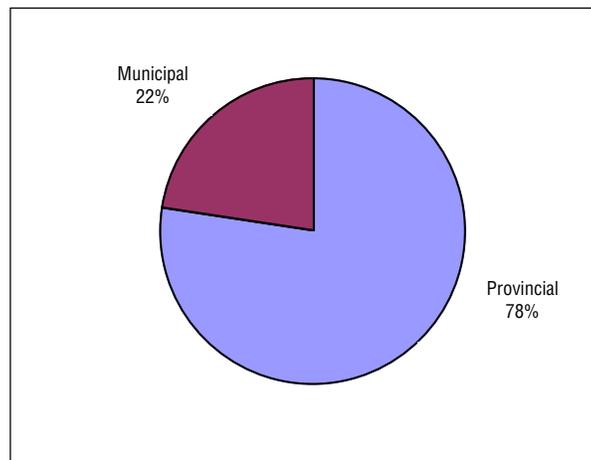
**CHART 2: 2003 Requests for Review Opened by Applicant Group**



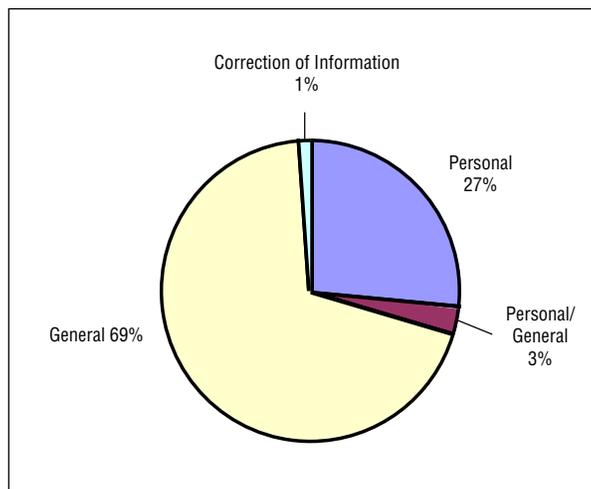
**CHART 3: Breakdown of General Public Requests**



**CHART 4: 2003 Reviews by Act**



**CHART 5: 2003 Reviews by Information Requested**



**TABLE 3: RESOLUTION OF FILES CLOSED IN 2003**

<b>Resolved by Review Report</b>	<b>Resolved through Mediation</b>	<b>Resolved through Partial Mediation and by Review Report</b>	<b>Withdrawn or Closed</b>	<b>Screened Out</b>
32%	30%	21%	6%	11%

NOTE: The Review Office closed 63 files in 2003.

**TABLE 4: 2003 CONCLUSIONS OF THE REVIEW OFFICER**

<b>Agree with Public Body</b>	<b>Agree in-part with Public Body</b>	<b>Disagree with Public Body</b>
36%	15%	49%

NOTE: The Review Office wrote 33 reports.

**TABLE 5: 2003 PUBLIC BODY RESPONSES**

<b>Recommendations Accepted</b>	<b>Partial Acceptance</b>	<b>Recommendations Rejected</b>	<b>Response Outstanding</b>
57%	24%	14%	5%

NOTE: Responses were required for 21 reports.

**TABLE 6: GOVERNMENT WIDE FOIPOP APPLICATIONS**

<b>Year</b>	<b>Academia</b>	<b>Media</b>	<b>General Public</b>	<b>Political</b>	<b>Interest Groups</b>	<b>Organizations</b>	<b>Other Public Body</b>	<b>Total</b>
2002	8	105	485	272	27	60	38	995
2003	6	55	338	139	6	160	23	727

NOTE: The above statistics were compiled by the Department of Justice. 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.

TABLE 7: 2003 PUBLIC BODY APPLICATIONS AND REVIEWS

<i>Provincial Act - Government Departments/Agencies/Boards and Commissions</i>		
<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Aboriginal Affairs	0	0
Agriculture & Fisheries	6	1
Archives & Records Management	0	0
Communications Nova Scotia	1	0
Community Services	92	6
Department of Energy	4	0
Economic Development	4	2
Education	16	2
Emergency Measures Organization	0	0
Environment & Labour (Includes Alcohol and Gaming Authority, Fire Marshal, Occupational Health and Safety)	303	7
Executive Council	9	0
Finance	15	1
Halifax-Dartmouth Bridge Commission	0	0
Health	83	10
Human Rights Commission	7	1
InNOVACorp	1	0
Intergovernmental Affairs	4	0
Justice	32	2
Natural Resources	16	2
Nova Scotia Business Inc.	4	2
Nova Scotia Gaming Corporation	1	2
Nova Scotia Legal Aid	0	0
Nova Scotia Boxing Authority	0	0
Nova Scotia Community College	0	0
Nova Scotia Film Development Corporation	2	0
Nova Scotia Liquor Corporation	8	0
Nova Scotia Resources	0	0
Office of Health Promotion	3	0
Police Commission	1	1
Premier's Office	9	3
Public Service Commission	6	0
Public Prosecution Service	16	1
Securities Commission	0	0
Service Nova Scotia & Municipal Relations	13	2
Sport & Recreation Commission	0	0
Tourism & Culture	4	0
Transportation & Public Works	23	1

<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Treasury & Policy Board	8	0
Utility & Review Board	0	0
Waterfront Development	0	0
Workers' Compensation Board	6	1
Workers' Compensation Appeals Tribunal	0	0
World Trade and Convention Centre	0	0
<b><i>Provincial Act - Universities/School Boards</i></b>		
<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Acadia University	1	0
Annapolis Valley Regional School Board	1	0
Atlantic School of Theology	0	0
Cape Breton-Victoria Regional School Board	0	0
Chignecto-Central Regional School Board	1	0
Conseil Scolaire Acadien Provincial	0	0
Dalhousie University	15	0
Halifax Regional School Board	3	1
Mount Saint Vincent University	3	0
Nova Scotia Agricultural College	0	0
Nova Scotia College of Art & Design	0	0
Saint Mary's University	2	0
South Shore District School Board	0	0
Southwest Regional School Board	1	1
St. Francis Xavier University	1	0
Strait Regional School Board	0	0
Tri-County School Board	1	0
Universite Sainte-Anne	1	0
University College of Cape Breton	1	0
University of King's College	0	0
<b><i>Provincial Act - District Health/Authorities</i></b>		
<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Annapolis Valley District Health Authority	1	0
Cape Breton District Health Authority	5	0
Capital District Health Authority	28	1
Colchester East Hants Health Authority	0	0
Cumberland Health Authority	3	0
Guysborough Antigonish Strait Health Authority	3	0
IWK Health Centre	4	2
Pictou County District Health Authority	2	0
South Shore District Health Authority	3	0
Southwest Nova District Health Authority	4	0

<i>Municipal Act - Commissions/Municipalities/Towns</i>		
<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Annapolis District Planning Commission	0	0
Cape Breton Regional Municipality	4	0
Digby Area Recreation Commission	0	0
Digby Water Commission	0	0
Halifax Public Libraries	1	0
Halifax Regional Municipality	17	2
Halifax Regional Water Commission	0	0
Lunenburg/Queens Regional Development Agency	0	0
Municipality of the County of Annapolis	0	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	0	0
Municipality of the County of Kings	1	0
Municipality of the County of Pictou	0	0
Municipality of the County of Richmond	0	0
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	2	0
Municipality of the District of Lunenburg	2	0
Municipality of the District of Shelburne	0	0
Municipality of the District of St. Mary's	1	0
Municipality of the District of West Hants	0	0
Municipality of the District of West Hants		
Planning Department	0	0
Municipality of the District of Yarmouth	0	0
Region of Queens Municipality	0	0
South Shore Regional Library	0	0
Town of Amherst	2	0
Town of Annapolis Royal	0	0
Town of Antigonish	0	0
Town of Berwick	0	0
Town of Bridgetown	0	0
Town of Bridgewater	0	0

<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
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	7	0
Town of Lockeport	0	0
Town of Lunenburg	1	0
Town of Mahone Bay	0	0
Town of Middleton	0	0
Town of Mulgrave	0	0
Town of New Glasgow	1	0
Town of Oxford	0	0
Town of Parrsboro	1	1
Town of Pictou	1	0
Town of Port Hawkesbury	0	0
Town of Shelburne	0	0
Town of Springhill	1	1
Town of Stellarton	0	0
Town of Stewiacke	0	0
Town of Trenton	0	0
Town of Truro	1	0
Town of Westville	0	0
Town of Windsor	0	0
Town of Wolfville	1	0
Town of Yarmouth	0	0
<b><i>Municipal Act - Police</i></b>		
<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Amherst Police	5	1
Annapolis Royal Police	0	0
Bridgewater Police	0	0
Cape Breton Regional Police	24	0
Halifax Regional Police	28	6
Kentville Police	0	0
New Glasgow	5	3
Springhill Police	0	0
Stellarton Police	0	0
Trenton Police	0	0
Truro Police	4	0
Westville Police	0	0

<i>Outside the Acts</i>		
<b>PUBLIC BODY</b>	<b>APPLICATIONS</b>	<b>REVIEWS</b>
Regional Independent Students Association	n/a	1