



**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum**

REVIEW REPORT FI-13-43

Report Release Date: September 26, 2013

Public Body: Department of Community Services [“Community Services”]

Record at Issue: Pursuant to s. 38 of the *Freedom of Information and Protection of Privacy Act* [“*FOIPOP Act*”], Community Services provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the Record, a portion of which was withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Review Officer or her delegated staff.

The Record at issue in the Review is two sections of a running record from a child protection file at Community Services withheld from the responsive Record disclosed to the Applicant.

Issues in the Review: The issues the Review Officer must decide are the following:

1. Whether Community Services is authorized to withhold information under s. 14 of the *FOIPOP Act* because it would reveal advice or recommendations. Whether
2. If yes, whether Community Services has properly exercised its discretion to apply the discretionary exemption.

Recommendation: I recommend Community Services release the severed portion of the Record in full to the Applicant.

- Key Words Considered:** advice, background information, deliberative process, discretion, recommendations, supervisor.
- Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, SNS 1993, c. 5, ss. 3(1), 14; *Freedom of Information and Protection of Privacy Regulations*, NS Reg 105/94, s. 24(1)
- Case Authorities Cited:** *McCormack v. Nova Scotia (Attorney General)* 1993 CanLII 3401 (NS SC), (1993), 123 N.S.R. (2d) 271 (N.S.S.C.); *R. v. Fuller* 2003 NSSC 58 (CanLII), 2003 NSSC 58; NS Reviews *FI-06-79*; *FI-12-106*; *FI-09-04*; *FI-10-49/FI-10-51*; ON Order *MO-2183*.
- Others Cited:** *Nova Scotia Procedures Manual – FOIPOP (2005)*.

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Background

The Applicant made an Application for Access to a Record to Community Services on April 15, 2013 for his/her own personal information, which read as follows:

Child protection case file from Oct. 2011 – Sept. 2012 was administrated by child welfare office in [Name of Town] NS. Then from January 2013 – April 2013 entries by Child Welfare workers at [Name of Municipality] office.

On May 16, 2013 the Department of Community Services [“Community Services”] made a decision, which read as follows [typographical errors in original]:

Enclosed are the records responsive to your request. Access to information has been granted in part. Information is being withheld pursuant to S. 14 of the Act, the head of the public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister. Personal information pertaining to third parties found in the records has been withheld pursuant to S 20(1) of the Act. This section prohibits the disclosure of personal information of a third party to an applicant if that disclosure would result in an unreasonable invasion of a third party’s personal privacy. Where information has been severed, it is noted by a reference to the FOIPOP Act.

On May 22, 2013 the Applicant filed a Request for Review [“Form 7”] with the Review Officer, which requested a review of Community Services’ “decision to redact 2 entries.” Accompanying the Form 7 was a letter from the Applicant providing details of his/her disagreement with respect to Community Service’s decision. These were treated as the Applicant’s Representations. The Review is with respect to the reliance by Community Services on s. 14 only.

On July 19, 2013 the Review Officer invited Community Services to provide Representations on the issues raised by its decision. The request specified that Community Services had to address two matters in its Representations:

1. Provide information as to how the exemption in s. 14 of the *Freedom of Information and Protection of Privacy [FOIPOP Act]* applied, and;
2. As s. 14 is a discretionary exemption, demonstrate how and why it exercised its discretion to sever part of the Record.

Attached to the request for Representations was a Research Summary outlining the key issues and cases related to how to interpret the s. 14 exemption. The Research Summary reminded Community Services to the fact that the burden rests with the public body to demonstrate that the exemption applies and how its discretion was exercised. The Representations were due on August 6, 2013.

On August 9, 2013 the Review Office sent a reminder to Community Services that its Representations were overdue and that if a response was not received by August 12, 2013, the matter would be forwarded to Formal Review.

Community Services did not respond, did not provide any Representations and did not communicate with the Review Office by the time the matter was in Formal Review on September 6, 2013.

Record

The Record at issue in the Review is two sections of a running record from a child protection file at Community Services withheld from the responsive Record disclosed to the Applicant.

Issues

The issues I must decide are the following:

1. Whether Community Services is authorized to withhold information under s. 14 of the *FOIPOP Act* because it would reveal advice or recommendations.
2. If yes, whether Community Services has properly exercised its discretion to apply the discretionary exemption.

Discussion

The only exemption at issue in this Review is s. 14 of the *FOIPOP Act*. Section 14 reads as follows:

Advise to public body or minister

14 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

(2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.

(3) Subsection (1) does not apply to information in a record that has been in existence for five or more years.

(4) Nothing in this Section requires the disclosure of information that the head of the public body may refuse to disclose pursuant to Section 13. 1993, c. 5, s. 14 .

Section 3, the interpretation section of the *FOIPOP Act*, provides a definition of “background information”

- 3 (1) In this Act,
(a) "background information" means
(i) any factual material

The Regulations under the *FOIPOP Act* provides further clarification with respect to "background information", which reads as follows:

Definitions of words and expressions with respect to the definition of "background information"

24(1) For the purpose of subclause 3(1)(a)(i) of the Act, "factual material" means a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts.

Under s. 14 of the *FOIPOP Act*, Community Services had the burden of proof to:

1. Identify whether it is advice or a recommendation; **and**
2. Show how each piece of information withheld fits the definition of advice or recommendation; **and**
3. That the advice or recommendations was sought or expected; **and**
4. That the advice or recommendation was directed at someone who could do make a decision based on the advice or recommendation; **and**
5. There was a deliberative process.

Community Services failed to provide any Representations with respect to this matter. In the absence of Representations or reasons for a decision, I am unable to evaluate if the exemption applies, and, if it does whether Community Services has exercised its discretion appropriately.

Findings

1. I find that in order to meet the test of "advice and recommendation" all steps in the test must be met, in other words, they are conjunctive [*FI-09-04*].
2. I adopt the definition of advice from our Supreme Court, which is as follows:

"advice" generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process
[*R. v. Fuller*, NSSC 58; *FI-10-49/FI-10-51*].

The test from the *Fuller* decision from the Nova Scotia Supreme Court has been adopted by the Department of Justice in the *Nova Scotia Procedures Manual – FOIPOP (2005)* as the test for s. 14.

3. I find Community Services erred by failing to provide any Reasons why the exemption was operative and by merely reciting the exemption section, which is

not sufficient under the *FOIPOP Act* [*McCormack v. Nova Scotia (Attorney General)*].

4. I find Community Services failed to meet its burden to demonstrate how s. 14 applied to the severed part of the Record because it did not provide any reasons in its decision and did not make any Representations to the Review Officer.
5. Community Services has failed to disclose how or whether it exercised its discretion and therefore has failed to meet the test of whether it properly exercised its discretion [*FI-06-79; FI-12-106*].
6. To satisfy myself that I had considered all the evidence before me, I reviewed the Record. I am not required to review the Record because there is no onus on the Review Officer to prove whether or how the exemption applies. It is Community Services that has the burden of proof to prove how the exemption applies and how it exercised its discretion. I find that Community Services has failed to meet that burden. A public body that does not engage in the Review process and meet its legal obligations by submitting Representations will neither be given the benefit of the doubt nor have their work done for them.
7. The Record relates to a worker seeking input from a supervisor. Community Services should be aware that the jurisprudence has consistently held that consultations with, or direction from, a supervisor does not constitute advice as contemplated by s. 14 [*ON Order MO-2183*].

Recommendation

I recommend Community Services release the severed portion of the Record in full to the Applicant.

Respectfully submitted,

Dulcie McCallum, LLB

Freedom of Information and Protection of Privacy Review Officer for Nova Scotia