REPORT **FI-02-37**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **PUBLIC PROSECUTION SERVICE** to deny access to documents related to an investigation of the theft of a police handgun.

REVIEW OFFICER: Darce Fardy

REPORT DATE: July 11, 2002

ISSUE: Whether the information sought can be denied under the "protection of personal privacy exemption" or the "harm to law enforcement" sections of the **Act**.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), dated March 4, 2002, the Applicant asked that I recommend to the Public Prosecution Service (PPS) that it disclose the documents he asked for.

The Applicant wants access to documents related to the theft of a police officer's handgun from the trunk of the police officer's car in September, 2000. The PPS refused to disclose the documents citing exemptions under **ss. 15(1)(f)** and **20(2)(f)** and **(h)** and **20(3)(b)** and **(d)**. Section 15(1)(f) allows a public body to refuse to disclose documents that would "reveal any information relating to or used in the exercise of prosecutorial discretion." Section 15(3) speaks to the disposition of information after a police investigation is completed:

> 15(3) After a police investigation is completed, the head of the public body shall not refuse to disclose to an applicant pursuant to this Section the reasons for a decision not to prosecute if the applicant is aware of the police investigation, but nothing in this subsection requires the disclosure of information mentioned in

subsections (1) and (2).

The police investigation has been completed and the applicant was aware of it. In a letter from the RCMP, he was told that the RCMP had been advised by the PPS that there was insufficient legal cause and insufficient evidential support to lay charges.

Subsections 20(2) and 20(3) must be read in conjunction s.20(1) which requires a public body to refuse to disclose "personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy." The third parties in this case are the individuals named in the documents. Section 20(2) lists the relevant circumstances which must be considered in making a decision on access to third party personal information. Section 20(3) lists the kinds of information which, if disclosed, would be presumed to be an unreasonable invasion of personal privacy. The particular subsections cited by the PPS are:

S.20(2)

(f) the personal information has been supplied in confidence;

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

S.20(3)

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(d) the personal information relates to employment or educational history.

There are six documents related to the investigation of the theft of the handgun. The PPS provided it arguments for denying access to each of the documents by number. Their arguments are as follows:

1. This document, a letter to a Crown Attorney from the RCMP, is "identifiable as part of an investigation into a possible violation of the law. . . ." The PPS, although it cites exemptions for refusing access to this document, believes it falls outside the scope of *FOIPOP* because it includes a statement provided without benefit of a police warning: ". . . it is the position of this Service [PPS] that a statement which would otherwise not be admissible under the rules of evidence in a court of law should not be released. . . through the FOIPOP Act."

2. This document, a synopsis of the investigation, contains personal information of two third parties and disclosing it would be an unreasonable invasion of their privacy because the matter is one of a possible violation of the law and contains educational and employment history [s.20(3)(b) and (d)].

3. The personal information in this document, a police officer's statement, includes employment history of the third party and is identifiable as an investigation into a possible violation of the law [s.20(3)(b) and (d)].

4. This is a statement by a witness which contains the personal information of two third parties and relates to an investigation into a possible violation of the law [s.20(3)(b)].

5. This is a letter from a solicitor to a Crown Attorney reviewing the evidence. It contains employment history of a third party and is therefore exempt from disclosure under s.20(3)(d). The PPS explained why it did not claim another exemption: "Although in the normal course Solicitor-Client privilege might also be claimed over this record as [the third party] was not notified of the application and this privilege is one that can be waived only by him that exemption [s.16] was not cited."

6. This document contains a legal opinion being sought in the exercise of

prosecutorial discretion and is denied for that reason under s.15(f) and because the document contains the personal information of a third party [s.20(3)].

The representation from the PPS concluded that "the inherent nature of police investigations requires that information be provided and held in confidence. After a court ruling some of that information may be admissible. However, in the present case the matter did not proceed hence it is the position of this Office that the record should not be released under FOIPOP." The PPS also believes disclosure of the records would unfairly damage the reputation of the police officer [S.20(2)(f) and (h)].

The Applicant says he wants to know why the police officer was not prosecuted for "unsafe storage of a firearm." He says he doesn't expect to be provided with personal information such as names or addresses.

The PPS says the applicant, in accordance with s.15(3), was provided with the reasons for the decision not to lay charges in a letter from the RCMP dated March 15, 2001. It said there was no need for PPS to provide a second letter.

Conclusions:

I will first determine whether ss. 20(3)(b) and (d) exempt disclosure.

It is clear that under ss. 20(3)(b) disclosing personal information gathered about the police officer during the investigation of a possible violation of the law would be an unreasonable invasion of the police officer's personal privacy. However, this would apply only to those documents in which the officer's personal information appears and where the personal information cannot be severed in accordance with **s. 5(2)** which requires a public body to sever exempt

information from a record and disclose the rest if the exempt information "can reasonably be severed."

With respect to s.20(3)(d) I find nothing in the documents that reveals anyone's educational or employment history. That phrase is not defined in *FOIPOP* but it is reasonable to assume that personal information tracking a person's educational or employment history would not be contained in the documents in dispute. The Nova Scotia Court of Appeal addressed the meaning of "employment history" in *Dickie v. Nova Scotia (Department of Health)* (1999) N.S.J. No. 116:

> (T)he words themselves and the context in which they are used suggest that the ordinary meaning of the words in the employment context is intended. In the employment context, employment history is used as a broad and general term to cover an individual's work record.

With respect to s.20(2)(f), one might assume that the information was provided in confidence but there is nothing in the documents to indicate this and the PPS did not address it in its arguments.

I agree that disclosure could unfairly damage the reputations of any persons referred to in the documents but, again, if their personal information can be severed, the remainder can be disclosed.

"Personal information" is defined in **s.3(1)(i)** as, among other things:

(i) the individual's name, address or telephone number,

(viii) anyone else's opinions about the individual.

In my view, the personal information of the two third parties can reasonably be severed, and the remainder disclosed without offending s.20.

With respect to s.15 (law enforcement), which in my view is the crucial exemption in this case, ss.(1)(f) applies even after a police investigation is over and a decision has been made not to prosecute. Any documents containing information used by PPS to determine whether charges should be laid, in my view, fall under the exemption in s.15(1)(f).

I have concluded all of the relevant documents are appropriately denied under s.15(1)(f) and, therefore, severing for personal information is not necessary.

Recommendation:

That the PPS write to the applicant and confirm its original decision not to disclose the records.

DATED this 11th day of July, 2002, in Halifax, Nova Scotia

Darce Fardy, Review Officer