REPORT **FI-03-09**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the IWK Health Centre to deny access to records with respect to the resignation of its Chief Executive Officer.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **April 2nd, 2003**

ISSUE:

Whether exemptions under Sections 20(1), 20(2) 20(3)(d), 19D(1), 14, 16 and 4A(1) support the decision of the IWK Health Centre to deny access to documents related to the resignation of its CEO.

Whether the purpose of the Act found in Section 2 (ensuring full accountability of public bodies) adds weight to the arguments for disclosure made by the Applicant.

Whether Section 71 of the *Hospitals Act* overrides the provisions of this **Act**.

In a Request for Review in accordance with the **Freedom of Information and Protection of Privacy Act** (FOIPOP), dated January 29, 2003, the Applicant asked that I recommend to the **IWK Health Centre**, (the IWK) that it disclose the information he is seeking.

The Applicant asked for copies of "all memos, e-mails, reports, complaints, reviews and other documentation" regarding the former CEO of the IWK.

The Application was denied, in a letter of decision to the Applicant dated December 16, 2002, under exemptions found in s.20(1) and 20(3)(d) which address the protection of personal information.

The matter involves the resignation of the President and CEO of the IWK and his subsequent hiring in the same capacity at the Capital District Health Authority (Capital Health).

In accordance with **Section 22** of this **Act**, the IWK notified several third parties of the Application to determine if they would consent to the disclosure of the information. All refused consent.

The IWK's submission to the Review Officer.

The IWK's submission to the Review Officer refers to specifics contained in the disputed documents. I am not at liberty to disclose those specifics since they contain information denied the Applicant.

In its submission to the Review, dated February 25, 2003, the IWK added several other exemptions. On the request of the Review Office, the IWK sent a second letter of decision to the Applicant to notify him of the new exemptions to assist him to make an informed submission to this Review.

In addition to s.20(1) and s.20(3)(d) the IWK added, as exemptions, Sections **4(A)(1)** and **(2)(g)**, **21(1)(a)(ii)**,**(b)** and **(c)(ii)**, **19D, 14(1)** and **16**.

Section 4A(1) and (2) deal with the issues of paramountcy and provides a list of other Acts of which some of their sections override the provisions of the FOIPOP Act.

Section 4A(1) of FOIPOP and Section 71 of the Hospitals Act:

The IWK argues that the information sought is not subject to FOIPOP.

Conflict with other enactments

> **4A (1)** Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record, the provision of this Act prevails over the provision of the other enactment unless subsection (2) or the other enactment states that the provision of the other enactment prevails over the provision of this Act.
>
> **(2)** The following enactments that restrict or prohibit access by any person to a record prevail over this Act:
>
> (g) Section 71 of the *Hospitals Act*;

The *Hospitals Act* provides for the confidentiality of some hospital records.

> S.71(1) 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.

In its submission, the IWK anticipates an argument that s.71(1) applies to people admitted to the hospital or receiving treatment at the hospital. The IWK says it would be redundant to refer to "persons" as distinct from "patients" if both had to be receiving treatment in hospital. "The logical interpretation is that person in the hospital is to be given its ordinary construction and could readily apply to employees and others in the hospital" if their records are held by the hospital. For that reason, the IWK concludes, the records requested by the Applicant are not subject to this **Act**.

Section 20:

Personal information

20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

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

(g) the personal information is likely to be inaccurate or unreliable; and

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

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;

(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;

(c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;

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

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

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

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

> (f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;
>
> (g) the information is about expenses incurred by the third party while travelling at the expense of a public body;
>
> (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; or
>
> (i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).
>
> **(5)** On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.
>
> **(6)** The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).

(For purposes of clarity I have underlined the particular subsections addressed by the IWK is its submission to the Review Officer.)

In its submission on the personal privacy exemption, the IWK follows the three step analysis used in *Dickie v. Nova Scotia (Department of Health)*(1999), 173, D.L.R.(4th):

- is the disputed material personal information within the meaning of the Act?
- if so, is the personal information related to employment history so that its disclosure is presumed to be an unreasonable invasion of personal privacy?

– does the balance of the relevant circumstances favour disclosure?

The IWK believes that the information at issue meets the definition of personal information.

With respect to step 2 it also argues that the records contain the employment history of the CEO and other third parties and, therefore, disclosure is presumed to constitute an unreasonable invasion of his personal privacy.

The IWK noted from some of my earlier Reviews, that I pointed to the importance of distinguishing "personal information" from "professional information". It's view, as expressed in its submission, is that disclosing professional information "is quite different from permitting wholesale access to an employment file or personal information". Support was again sought in *Dickie* which said that the ordinary meaning of "employment history" was intended and that s.20(3)(d) should be used as a "broad and general term to cover an individual's work record". *Dickie* concluded "(t)he importance of the privacy in this area is further underlined by the specific prohibition of disclosure respecting labour relations matters in section 21(1) (cited below in this Review) and by the much more confined entitlement to information relating to the "position, functions or remuneration as an officer of a public body".

With respect to the factors found in s.20(2), the IWK again anticipates an argument from the Applicant that s.20(2)(a) applies because "there is a public interest in subjecting the hospital's activities to public scrutiny". The IWK submission cites my Review in 2001 *(FI-01-76)*, which also deals with a privacy protection claim made by the IWK, in which I agreed that

disclosing personal information about a dismissed physician would be an unreasonable invasion of personal privacy.

The IWK sees significance in the fact that the Applicant is a reporter and believes this "is relevant to the determination of whether disclosure ought to be allowed". It argues that this matter is significantly different from those dealt with in *Dickie* and *French*, where personal information was ordered disclosed, because in those two Nova Scotia Court of Appeal cases the Appellants were looking for disclosure of their own personal information. (*Andrew S. French v. Dalhousie University* (2002) NSSC 022). The Applicant asking for this Review would use the information, according to the IWK, "to expose him (the CEO) unfairly to other harm" [s.20(2)(e)].

Section 21(1):

Although this exemption has not been used to protect against the disclosure of personal information, the IWK believes it adds further support to its arguments. This exemption has normally been used to protect the commercial interests of third parties

> **Confidential information**
>
> **21 (1)** The head of a public body shall refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that is supplied, implicitly or explicitly, in confidence; and
>
> (c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization, or

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) The head of a public body shall disclose to an applicant a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an enactment.

(4) Subsections (1) and (2) do not apply if the third party consents to the disclosure.

I am unable to reveal at length the details of the arguments of the IWK on this exemption without disclosing information that the IWK has denied access to. However, it made the points that "labour relations" cannot be reserved for union matters.

Section 14(1):

Advice 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.

Again I am in the position of being unable to provide the basis for the IWK's argument in favour of denying access under "advice".

Section 16:

> **Solicitor-client privilege**
>
> **16** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

The IWK submits that the documents contain advice from a solicitor it consulted.

Section 19D:

> **Certain hospital records**
>
> **19D (1)** The head of a local public body that is a hospital may 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 local public body or any committee of the local public body for the purpose of education or improvement in medical care or practice.
>
> **(2)** Subsection (1) does not apply to medical and hospital records pertaining to a patient.

With respect to this exemption the IWK wrote:

> Section 19D was, of course, extensively reviewed in **Report FI-01-76, Re: IWK Grace Health Centre**. Arguments and evidence were advanced to maintain the confidentiality and integrity of the Peer Review process captured in s.19D. In that case, there was an investigation leading up to the dismissal of a physician at the IWK. The applicant, a member of the media, requested information concerning the recruitment, hiring and dismissal of a physician. On the facts of that case, the investigation into behaviour and practices of this physician was not felt to be part of an ongoing quality assurance program, except in its broadest sense. Having said that, the Review Officer accepted that Peer Review, as part of a quality assurance program ought to remain confidential so as to preserve full, frank and honest discussion. In the result, it was recommended that the hospital prepare and provide a summary of the credentials of the dismissed physician, what the complaints against him were, and the reasons for his dismissal. The specific documents themselves were not recommended to be disclosed as they might reveal criticisms, matters of opinion and recommendations for changes of those who participated in the Peer Review.

Submission to the Review of a third party:

In its submission the third party cited the same exemptions as the IWK, except for s.19D, s.14(1) and s.16. The arguments against disclosure were similar.

The third party said the balance in favour of providing access to the documents to ensure public accountability was far outweighed by the harm that would flow from the release.

The Applicant's submission:

Section 4A(1) of the FOIPOP Act and section 71 of the Hospitals Act:

The Applicant is not satisfied this exclusion can be used to deny information relative to a doctor or hospital administrator unless by disclosing the information, patient information would also be revealed. "This section refers to the rights of individuals admitted to the hospital, and not to members of hospital staff. The entire context of the section deals with the rights of patients and duties of staff in relation to them and the word 'person' is used in the sense of a person under observation to distinguish this person from a patient as it is used in section 42(1) of the Hospitals Act and in the definition section of the Act which contains the following definitions:

> 'Patient' means a person who receives diagnosis, lodging or treatment at or in a hospital
>
> 'Person' under observation' means a person who is in a hospital pursuant to Section 35
>
> Section 35 deals with a person being admitted to a facility for observation".

The Applicant admitted it was difficult to argue s.21(1) because he doesn't know what information is in the documents that might support that exemption.

Section 19D(1):

The Applicant submits that s.19D(1) applies only if a two-way test is passed. The information in dispute must have been used:

> (a) in the course of, or arising out of any study, research or program carried on by or for the local public body; and
>
> (b) for the purpose of education or improvement of medical care or practice.

The Applicant also found support for his arguments in my Review *FI-01-76* in which I concluded that the matter at issue in that case was not part of an "ongoing quality assurance program" because quality assurance was not the dominant purpose of the investigation of the dismissed physician. The Applicant quotes from that Review:

> To use such a broad interpretation is not in accordance with the purposes outlined in s.2 or the sentiments expressed in Nova Scotia's Supreme and Appeal Courts. It could result in the placing of all but a hospital's administrative matters outside its obligations for accountability. I don't believe the legislators had that in mind.
>
> It is my view that the Hospital can disclose information about the recruitment, hiring and dismissal of a physician without revealing the "criticisms, matters of opinion and recommendations for changes" of those who participate in the peer review...

Section 20:

With respect to s.20(2)(a), the Applicant believes hospitals in particular should be subject to close scrutiny because their activities "have a profound impact on the well being of the citizenry". The Applicant dismissed any concerns under s.20(2)(e) (financial harm) because the CEO was employed by another health care institution after his resignation from IWK. He continues that having considered s.20(2)(h) he has concluded that since the IWK regretted his resignation there can be no harm to his reputation.

The Applicant could not make arguments concerning s.20(3)(d) or (g) because he doesn't have the information to determine if they apply or not. But he believes s.20(4)(e) applies because the information is about the CEO's position and functions as an officer of the IWK.

The Applicant again cited my Review *FI-01-76* in which I quote from *O'Connor v. Nova Scotia* 2001, NSCA 132 in which the Court of Appeal drew attention to the uniqueness of

Nova Scotia's FOIPOP. It noted that Nova Scotia is the only province whose legislation "...declares as one of its purposes a commitment to ensure that public bodies are 'fully accountable to the public'". In *O'Connor* the Court concluded that the legislation in Nova Scotia "is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada".

The Applicant also believes that the IWK should have considered **Section 31(1)** of the **Act** - Disclosure in the Public Interest.

> **31 (1)** Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information
>
> (a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
>
> (b) the disclosure of which is, for any other reason, clearly in the public interest.

The Applicant believes that the CEO's "sudden" resignation from the IWK, "in which it has been acknowledged that an investigation took place", followed by his hiring to the same position with Capital Health, requires more accountability than the IWK has demonstrated.

Conclusions:

I am grateful to the three parties for providing this Review with complete representations.

I do not agree with the IWK's assertion that the occupation of the Applicant (a journalist) is relevant. A decision on an access request cannot be made on the basis of what an

applicant will do with the information. A recent Supreme Court of Canada ruling said "personal information" is defined (in the *Privacy Act)* "without regard to the intention of the person requesting the information".

> ...the *Access Act* provides that every Canadian citizen and permanent resident 'has a right to and shall, on request, be given access to any record under the control of a government institution'. This right is not qualified... (it) does not confer on the head of government institutions the power to take into account the identity of the applicant or the purposes underlying a request. [*Canada(Information Commissioner) v. Canada (Commissioner of the Royal Canadian Mounted Police)* 2003 SCC 8]

Paramountcy of the Hospitals Act:

I agree with the Applicant's position with respect to section 71. It should be clear, after reading Sections 42(1) and 35 of the *Hospitals Act* that Section 71 of that Act is designed to protect health records of patients who are in hospital for treatment and persons who there for observation. Other hospital records are subject to the FOIPOP Act.

S.20 - Protection against an unreasonable invasion of personal privacy:

In line with *O'Connor*, I agree with the Applicant that the "purposes of the Act" found in Section 2 should be part of any consideration of this matter. If IWK is to be "fully" accountable to the public, can it conclude that disclosing any information about an unexpected resignation by its CEO and President, would be an unreasonable invasion of his personal privacy?

In my view, the IWK's decision and this Review rests on the personal privacy issue. In reviewing the documents I first, as suggested by the Courts, considered whether the information in the documents meets the definition of "personal information" as found in s.3(1)(i). I have concluded that it does.

My next step is to determine whether any of the documents fall within s.20(4). If they do there will be no need to consider s.20(3) or the factors in s.20(2). If third party consent [refer to part (a) of s.20(4)] had been provided, the IWK would be obliged to disclose the documents. However, none of the third parties has "consented in writing" to the disclosure of the documents that hold their personal information.

The other relevant part is s.20(4)(e), which is cited by the Applicant : information about the third party's position, functions or remuneration as an employee of a public body. In my view, the bulk of the information, with only three exceptions which I will outline below, does not fit that description.

With respect to ss.20(3)(g), I agree that the personal information "consists of personal evaluations". Unless this assumption can be successfully rebutted using s.20(2), then disclosing those documents that hold that kind of personal information would constitute an unreasonable invasion of privacy.

The relevant questions to ask with respect to considering the factors found in s.20(2) are:

(a) is disclosure desirable to subject the IWK, as a public body, to public scrutiny? Is it in the public interest to disclose the information?

(e) will the third party will be exposed unfairly to financial or other harm?

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

(h) will disclosure unfairly damage the reputation of any person.

In my view, factor (a) warrants special attention. It is known that the President and CEO's resignation from the IWK was accepted and that he was subsequently hired as the President and CEO of Capital Health. It's worth noting that the public announcement of his hiring made by the Chair of the Capital Health Board of Directors raised the matter of his resignation from the IWK. The announcement said that the Board of IWK had resisted his resignation and assured him of their full support and confidence. The announcement also said the Chair of Capital Health had been fully briefed on the circumstances of the resignation. It is apparent that the Chair of Capital Health recognized that the resignation from IWK was an issue to be addressed.

The IWK has agreed there is a matter of accountability but believes that the third party's right to privacy outweighs the value of public accountability.

I have concluded that disclosing most of the documents, even one which might seem benign in another context, would constitute an unreasonable invasion of personal privacy. In *FI-02-76* I recommended to the IWK that a summary be provided. In this case a useful summary would contain personal information and would, in my view, constitute an unreasonable invasion of personal privacy.

However, I believe the IWK must fulfill its mandated obligation to be accountable by disclosing a little more than was made public in the public announcement by Capital Health. The portions of the documents I am recommending for disclosure contain information about the CEO's position and functions.

Section 21:

These three documents were also denied under s.21(1). To prove this applies a public body would have to show that the information meets the three-way test in parts (a), (b) and (c). Part (b) requires that the information in the documents be "supplied" to the public body in confidence. Only one of the three documents was supplied by the third party and no argument has been provided to prove this document was provided in confidence. In any case these types of documents are routinely released. Having concluded that part (b) does not apply, I have no need to address parts (a) and (c). However I will comment briefly on the claim the documents contain "labour relations" matters. If we adopt the "ordinary meaning" of words, as the Courts suggest, we would not conclude that the matters at issue here involve "labour relations information". Nor has it been shown that the "labour relations information" belongs to the third party and not to the IWK.

Because none of the other exemptions cited was attached to the three documents I have isolated, there is no need for me to address them.

Recommendations:

That the IWK disclose:

- portions of the document found on pages marked 42 and 43;
- portions of the letter dated April 26, 2002, on the page marked 46; and
- portions of the undated letter found on the page marked 47.

I am forwarding to the IWK, attached to this Review, copies of the three documents with the portions highlighted which I have recommended be disclosed.

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Section 40 requires the IWK to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of the decision.

Dated at Halifax, Nova Scotia this 2nd day of April, 2003.

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Darce Fardy, Review Officer