

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF COMMUNITY SERVICES** to deny access to certain documents.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **May 15th, 2003**

ISSUE: Whether Sections 14(1) (advice) and 20 (personal privacy) support the decision to deny access to documents.

In a Request for Review pursuant to the **Freedom of Information and Protection of Privacy Act**, dated January 28th, 2003, the Applicant asked that I recommend to the Department of Community Services (the Department) that it disclose all of the information she is seeking.

The Applicant had asked for a copy of all records and reports that are in the possession of the Department concerning the death of her daughter while staying at Edwards House, a young students' residence operated by the *Regional Independent Students' Association*. She also asked for the records of a school counsellor. (The Association is a non-profit organization which operates student residences and support centres to provide a positive secure living environment for students at risk of not completing high school. The Department pays a per diem for eligible students.)

The Department, in its response to the Applicant, explained that the counsellor whose records were being sought was an income assistance worker employed by the Department. A complete copy of the worker's file was provided to the Applicant.

The Department also provided to the Applicant:

- A copy of a review of Child Welfare files with personal information removed pursuant to **Section 20**, and advice, pursuant to **Section 14(1)**;
- A copy of an internal review with recommendations removed pursuant to s.14(1); and a copy of a revised admission form for Edwards House;
- A copy of documents related to guidelines, policies and procedures of Edwards House with personal information removed; and
- Copies of e-mails and other correspondence and briefing notes with personal information and advice removed.

With respect to the exemption claimed under s.14(1), the Department explained to the Applicant that staff must be able to provide advice and recommendations "in a forthright fashion and with confidence that their advice and recommendations are for the consideration of their colleagues only".

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.

The Department further explained that recorded interviews with other young people at Edwards House are being denied because they contain their personal information which was provided in confidence. It cited Section 20(1) and sub-section 20(2)(f).

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

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

The Department concluded, in its letter of decision to the Applicant, that a document described as “Sequence of Events” and the statement by the staff member on duty the night of the incident were provided to the Department by Edwards House in confidence.

In her Request for Review, the Applicant asks the Review Office to recommend that the Department provide:

- A. The severed parts of the *Internal Review of Procedures*;
- B. The statements of residents of Edwards House with names severed;
- C. The statement of the staff member on duty at the time of the death;
- D. The Sequence of Events;
- E. The handwritten daily staff logs for the period November 1st, 2001 to November 20th, 2001;

- F. A copy of the complete file on the deceased maintained by Edwards House;
- G. Copies of contracted agreements between the Department and the Regional Independent Students' Association;
- H. A list of the names of all staff at Edwards House from November 1st to 20th, 2001;
- I. A list of the staff on duty on the night of November 19th, 2001;
- J. Minutes of all Board of Directors meetings held between November 1st, 2001 and the date of the application.

The Department, during the review process, said the items identified in F to J were either not in the possession of the Department or were irrelevant. The Department made no further submission to the Review.

The Applicant, in her submission to the Review, says she has no interest in peoples' personal information. She would like to determine if any of the documents reflect a shortfall in the delivery of services by Edwards House or in the procedures followed on the night of the incident.

With respect to part C the Applicant believes the statement of the employee on duty the night of the incident should be made public after severing identifying information about other individuals.

As a result of mediation during this Review, the documents remaining at issue are found in A to D.

Conclusions:

I agree with the Department that some of the information sought is the personal information of the residents who provided witness statements. But the records also include the personal information of the deceased.

The Department did not address the privacy rights of the student who died. It is clear that individuals' privacy rights continue after their deaths. This has been my conclusion in two earlier Reviews, FI-01-59 and FI-01-81, supported by **Section 30 (c)** of the **Act**.

30 The Public Archives of Nova Scotia, or the Archives of a public body, may disclose personal information for archival or historical purposes where

(c) the information is about someone who has been dead for twenty or more years.

Section 43 sets out the circumstances in which another person can exercise someone's

rights or powers under the **Act**. Subsection 43(a) reads:

Any right or power conferred on an individual by this Act may be exercised (a) where the individual is deceased, by the individual's **personal representative** if the exercise of the right or power relates to the administration of the individual's estate.

The **Act** does not define "personal representative". In British Columbia and Ontario the term has been given a restrictive meaning corresponding to its use in statutes related to wills, trusts and estates. In both cases it has been interpreted to mean the executor of a will.

Although the Applicant has provided documents showing her to be the “next of kin” to the deceased and that the deceased was a dependent, there is no evidence the Applicant is the “personal representative” of the deceased.

Order MO-1075 of the Ontario Information and Privacy Commission concludes that the phrase “administration of the estate” “should be interpreted narrowly to include only records which the personal representative requires in order to wind up the estate”. There is no evidence the Applicant requires these records to wind up the estate of the deceased.

In Order MO-1538, the Ontario Commission said this phrase would not apply “if the only action contemplated is a wrongful death suit on the part of family members”.

Section 20 of the **Act** also protects the privacy rights of the deceased against an unreasonable invasion of privacy.

To determine if disclosure would constitute an unreasonable invasion of the deceased’s privacy, the various sections of s.20 must be considered.

Section 20(1) and (2)(f) - personal information received in confidence:

Section 20 is a mandatory exemption. **Section 45(2)** lays the burden of proof on the Applicant to show that disclosure of personal information would not constitute an unreasonable invasion of a third party’s personal privacy.

When determining whether disclosing personal information constitutes an unreasonable invasion of privacy one must first decide whether the personal information fits an

exception under subsection 20(4). If the information fits any of these categories then disclosure is not deemed to constitute an unreasonable invasion of privacy. The categories include:

- (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;

I am satisfied that none of the information fits an exception under subsection 20(4).

Subsection 20(3) contains a list of the kinds of personal information which, if disclosed, would be presumed to constitute an unreasonable invasion of personal privacy.

In my view subsection 20(3)(a) applies:

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

The Department did not claim subsection 20(3) as an exemption. However, I am satisfied that disclosing some of the information would constitute an unreasonable invasion of the personal privacy of the deceased.

Subsection 20(2) must also be considered. It was the only subsection of s.20 addressed by the Department. It obliges a public body to balance all relevant factors favouring disclosure with those favouring non-disclosure.

20(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.

In my view, the three relevant factors, given the circumstances of this application, are found in subsections 2(a), public accountability, and 2(b), promotion of public safety and 2(f) provided in confidence.

In my view, the Department has some responsibility for ensuring the safety and security of the students it supports. But I have concluded this does not outweigh its obligation to deny access to the personal information of the deceased and others.

Section 14(1):

“Advice” and “Recommendations” are discretionary exemptions under the **Act**.

While

a public body may refuse to disclose advice and recommendations, it is not obliged to. In my Reports, *FI-02-56* and *FI-02-77*, I addressed the matter of the “use of discretion”. In these reviews I quoted from the Alberta Government’s manual on Freedom of Information and Protection of Privacy:

A public body must not replace the exercise of its discretion with a blanket policy that certain types of information will not be released. However, public bodies can develop guidelines to help guide the exercise of discretion, providing they are not interpreted as binding rules. (P.87 *Freedom of Information and Protection of Privacy, Guidelines and Practices*, Alberta, March 2002.)

The Alberta Information and Privacy Commissioner believes a FOIPOP administrator’s rationale to use her or his discretion in a certain way “must be both demonstrable and reasonable” (*Order 2000-021*). He also provided some factors to be considered by a public body when considering a discretionary exemption, including:

- the general purposes of the Act;
- the nature of the record and the extent to which it is significant or sensitive to a public body;
- whether disclosure of the information will increase public confidence in the public body; and
- whether there is a definite and compelling need to release the record.

The Ontario Commission says a ‘blanket’ approach to the application of an exemption would represent an improper use of discretion (*Order P-344*).

The Department did not demonstrate the use of its discretion in this case. As the Review Officer, I cannot substitute my discretion for a public body's but I propose the Department re-examine how it exercised its discretion to deny access to the recommendations.

I have carefully reviewed the "internal review of procedures" and have concluded that parts of it can be disclosed because they contain neither personal information nor "advice" or "recommendations". Parts of it contain "background information" which must be disclosed.

Recommendations:

That the Department disclose, in addition to what it has already disclosed,

- a severed copy of pages 9, 10 and 11 of the "Internal Review of Procedures".

To assist the Department, I have highlighted those parts that I recommend be disclosed.

Section 40 requires the Department to make a decision on this recommendation within thirty days of receiving this report and to notify the Applicant and the Review Officer, in writing, of that decision.

NOTE:

Ontario's Privacy Commissioner has expressed concern about the inability, under legislation, of immediate family members, or their representatives, to obtain information surrounding

the circumstances of a relative's death.

She said that, except in certain limited circumstances, institutions in Ontario must deny relatives access to this information because disclosure is presumed to be an unjustified invasion of the deceased's personal privacy under the province's provincial and municipal information and privacy Acts.

The Commissioner concluded that "a statutory amendment to address this sensitive and compelling issue is clearly required".

The same situation exists in Nova Scotia. This case is one of those compelling issues and I recommend to this Department that it consider recommending an amendment to the Act to address this.

Dated at Halifax, Nova Scotia this 15th day of May, 2003.

Darce Fardy, Review Officer