REPORT **FI-03-14**

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 a copy of a Crown Prosecutor's files.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **July 16, 2003**

ISSUE: Whether exemptions under Section 15(1)(c) and (f) (law enforcement) support the decision to deny access to a copy of a Crown Prosecutor's files.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated February 5, 2003, the Applicant asked that I recommend that the **Public Prosecution Service** (PPS) disclose all of the records he has requested.

The Applicant was charged with a crime and was subsequently acquitted. All appeal periods have expired.

The PPS provided the Applicant with some records. It originally refused others under exemptions found in **Sections 15(1)(c)** and **(f)**, **20(2)(g)** and **20(3)(b)** (protection of privacy). It later added **s.20(1)**as well. During the mediation process, the Review Office was able to have the application refined and reduced and the protection of personal privacy (s.20) was no longer an issue. The applicable subsections of s.15 are:

Law enforcement

> **15 (1)** The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> > (c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement;
> >
> > (f) reveal any information relating to or used in the exercise of prosecutorial discretion.

The documents in dispute, following mediation, are:

1 The Crown Prosecutor's handwritten trial and witness examination and preparation notes;

2 Correspondence between the prosecutor and the RCMP;

3 Correspondence between the prosecutor, the insurance adjuster and the town of Parrsboro; and

4 Correspondence between a particular witness and the prosecutor.

In its letter to the Applicant, PPS did not expound on its decision. However, it did so in its submission to this Review.

The PPS submission to the Review:

Item #1 - The Prosecutor's Notes

In supporting its decision to claim s.15(1)(f) over the prosecutor's notes (Item #1) PPS said it had concluded that the information in the notes met the definition of "law enforcement" found in **Section 3(1)(e)(iii)** of the **Act**: "proceedings that lead or could lead to a penalty or sanction being imposed."

It went on to say:

> "This position [to claim s.15(1)(f)] is taken on the basis that the records in question are crown work product. If the accused had made an application to the court under the rules of disclosure as established by the Supreme Court of Canada in *R. v. Stinchcombe* and the cases which followed it, records classified as crown work product would not be accessible to the Applicant as an accused. It is argued, therefore that what the Applicant does not have the right of access to as an accused he cannot have the right to under provincial legislation."

It added, to further support its decision:

> "..it is argued that the records in question were made during the course of the trial which the Applicant attended. The Applicant had the opportunity at that time to dispute any evidence presented. In addition, if the Applicant wishes to refresh his mind as to the evidence presented at the trial he can do so by requesting either a copy of the transcript or a copy of the recorded proceedings both of which are public record neither of which is contained in the crown file. These public records would provide the Applicant with an accurate depiction of the trial proceeding rather than the Crown Attorney's opinion of the proceeding through his notes."

Item #2 - Correspondence between the Prosecutor and the RCMP

With respect to these records, the PPS repeated the arguments under s.15(f). In addition, the PPS said that some of the correspondence provides "a clear example of the exercise of prosecutorial discretion" because the correspondence required the prosecutor to re-evaluate the case.

The PPS also cited s.15(c) on this record. It argued that "revealing the manner in which the crown and the police prepare and then present a case is harmful to law

enforcement." One letter in particular, it believes, reveals specific kinds of procedures the police use in securing safety.

On this item, the PPS raised an exemption it had not cited in its letter of decision. It now claims that the letters between the RCMP and the Crown Prosecutor are protected by solicitor-client privilege **(Section 16)**.

Items # 3 & 4 - Various correspondence by the Prosecutor:

On these records which consist of several letters, PPS repeated the arguments it made on Item # 1.

The Applicant's submission:

The Applicant wonders how disclosing the records could harm the effectiveness of "investigation technique, or procedures"given that he was acquitted. The Applicant also believes this **Act** gives him an absolute right of access to his own personal information held by a public body.

Conclusions:

Although I agree that the records sought meet the definition of "law enforcement" found in **Section 3(1)(e)(iii)** of the **Act** this does not, of course, automatically lead to the conclusion that the records are exempt from disclosure. The PPS must prove that the requested information falls under s.15(1)(c) and (f) and that disclosure will either "harm the effectiveness of investigative techniques" or "reveal any information relating to or used in the exercise of prosecutorial discretion."

Furthermore, since s.15 is a discretionary exemption, the public body must show that once it concluded the records came under s.15, it sent on to consider whether or not to exercise its discretion and to disclose the records. The following are my conclusions with respect to the arguments put forward in PPS' submission.

Item #1 - *The Prosecutor's Notes:*

Although these notes were denied under s.15(1)(f), the submission of the PPS makes no argument as to what it considers constitutes "prosecutorial discretion." Instead it cited *R.v.Stinchcombe,* a decision of the Supreme Court of Canada, which addresses the issue of the Crown's obligation to make disclosure to the defence during the course of an ongoing criminal proceeding. If the facts in this Review related to an ongoing criminal proceeding, the **Freedom of Information and Protection of Privacy Act** would not apply.

The PPS does not help its position by adding, as a supplementary argument, that the Applicant could have found some other way to get the information he is seeking. It is made clear in the converse of **Section 4(2)(i)** that the **Act** applies to records relating to a prosecution if all proceedings have been completed. The Applicant is entitled to make an application under the **Act** for these records.

As noted, neither of the arguments relate to **s.15(1)(f)**.

This **Act** does not define "prosecutorial discretion" but a definition can be found in the British Columbia access and privacy legislation which is similar to Nova Scotia's:

"Exercise of prosecutorial discretion means the exercise by Crown Counsel, or

by a special prosecutor, of a duty or power under the *Crown Counsel Act*, including the duty or power

(a) to approve or not to approve a prosecution,
(b) to stay a proceeding,
(c) to prepare for a hearing or trial,
(d) to conduct a hearing or trial,
(e) to take a position on sentence, and
(f) to initiate an appeal."

While it would have been helpful if the PPS had directly addressed the issue of whether the records fall under s.15(1)(f), I am satisfied that they do. However, what is not obvious is how or whether PPS carried out a discretionary decision-making process in reaching its decision not to disclose these records. To quote the Government of Alberta's Manual titled *Freedom of Information and Protection of Privacy, Guidelines and Practices*: **"A public body must not replace the exercise of discretion with a blanket policy that certain types of information will not be released"** (Government of Alberta, 2002, p. 87). A public body must be prepared to show how it exercised its discretion. I refer the PPS to my Review Report *FI-02-56* for more on the exercise of discretion.

Item #2 - *Correspondence between the Prosecutor and the RCMP:*

It is on this correspondence that PPS lays a late claim of solicitor-client privilege. The Applicant was not notified by PPS of this new exemption.

In October 2002, in response to what I noted to be a growing practice of public bodies making "late exemption" claims, the Review Office issued a policy that new discretionary exemptions may only be claimed within 15 days after a public body is notified that a Review has been filed with this Office. This Office acknowledges that the **Act** places no time frame on citing exemptions but it concluded that if there was no limit on when a public body could introduce a new exemption, it would be impossible for the Review Officer to complete Reports in a timely fashion. In this case, the new exemption was entered on July 2, 2003, more than five months after the decision on this application was provided to the Applicant.

In my view, a reasonable person, on reading the **Act,** would conclude that, in unusual circumstances, a late exemption may be filed. However, no reasonable person would expect that the time for filing late exemptions would be unlimited. Accordingly I am not considering the application of s.16 on the records at issue here.

With respect to s.15(1)(f), the PPS adopted the same position it did on the other records.

The PPS claimed also s.15(1)(c) on these records. It argues disclosure of the correspondence between the prosecutor and the RCMP could, to quote the section, "reasonably be expected to harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement."

PPS argues that the documents reveal "the manner in which the crown and police prepare and then present a case" and thus cause harm to law enforcement by revealing

investigative techniques. It specifically identifies one document which discusses security issues on an unrelated matter but argues that the disclosure of these matters would generally reveal investigation procedures and thus should be withheld. It describes the disclosure of this record as problematic, which the dictionary defines as "doubtful," "uncertain" or "questionable." The Federal Court of Canada would not, in my view, accept this argument to support the s.15(1) (c) exemption. In *Canada (Information Commissioner) v. Canada (Chairperson, Immigration and Refugee Board)*(1997-12-14), FCT T-908-97, the court said:

> (w)here the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard of proof is not met.

In my view PPS has not proven that the records in Item #2 come under s.15(1)(c) in that disclosure would "reasonably be expected to harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement." The letters between the prosecutor and the RCMP cannot be denied the Applicant under s.15(1)(c). However, I am satisfied they fall under s.15(1)(f). I am also satisfied there is some evidence that the Department used its discretion on the letters in deciding whether to withhold them under s.15(1)(f).

Items # 3 & 4 - Various correspondence by the Prosecutor:

My comments on Items #3 and #4, are reflected in my remarks about Item #1.

With respect to the Applicant's claim to the right of access to his own personal information, I have concluded that, while most of the records identify the Applicant and

therefore contain his "personal information" as defined in **Section 3(1)(i),** the information also comes under s.15(1)(f) and must be considered under that exemption.

Recommendations:

That the PPS

- with regard to Items 1, 3 and 4, issue a supplementary decision showing an exercise of discretion with regard to its consideration of whether these records should be disclosed.

Section 40 of the Act requires PPS 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 16th day of July, 2003.

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Darce Fardy, Review Officer