REPORT **FI-03-58(M)**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT (MUNICIPAL)

A REQUEST FOR REVIEW of a decision of the **HALIFAX REGIONAL POLICE** in response to an application for access to police records of a downtown Halifax disturbance.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **April 28, 2004**

ISSUE: Whether **Sections 480(1)** and **480(3)(b)** of the Municipal Government Act support the decision of the Halifax Regional Police to deny records to the Applicant.

In a Request for Review under **Part XX of the Municipal Government Act** (MGA), dated October 14, 2003, the Applicant asked that I review the decision of the **Halifax Regional Police** (HRP) in response to his application.

The Applicant asked for all statements, reports . . . incident reports, police notebooks, records of calls to paramedics, the names of the paramedics, all related to an incident outside a downtown Halifax bar on September 5 and 6 of 2001.

Background:

The Applicant is a solicitor representing three men who were involved in a fracas outside a Halifax bar. They were arrested by the HRP and spent the night in police cells. They

were not charged. According to the Applicant, when the three men were released the next morning it was discovered that one of the men had a broken leg. They claimed they were assaulted by the bar's "bouncers" who, the three men claimed, used unnecessary force. The solicitor wants to know the names of the bouncers who he suspects were off-duty police officers.

The HRP disclosed the notes taken by one of the police officers called to the scene, with names of witnesses and other personal information severed, as well as a copy of the 'incident history', again with witnesses' names removed.

The issues:

The HRP claimed that disclosing the personal information would be an unreasonable invasion of the personal privacy of third parties and was thus exempt under subsections **480(1)** and **480(3)(b)** of the MGA.

> **Personal Information**
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> **480(1)** The responsible officer shall refuse to disclose personal information to an applicant, if the disclosure would be an unreasonable invasion of a third party's personal privacy.
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> **480(3)**A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if the personal information
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> **(b)** was compiled, and is identifiable as, part of an investigation into a possible violation of the law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation.

The Applicant's submission:

The Applicant said the personal privacy exemption was not warranted because people working as bouncers in a bar have no expectation of privacy. It is also his opinion that disclosing the names of witnesses to the altercation would not be an unreasonable invasion of their personal privacy. He also wondered why there were so few records arising out of the incident. He expected there would be more records than the notes of one police officer and the incident report because the altercation was treated seriously and three men were put in police cells. The Applicant questions why no statements were taken from the three men and why, given that a number of police were called to the scene, only one officer took notes.

The Applicant also cited a previous Review (FI-02-01) which addressed a similar case involving a decision of the HRP and the same bar. In this Review, I recommended more records be disclosed.

The Department's submission:

As part of my Review, and in response to the Applicant's concerns, I put several questions to the HRP in an e-mail dated March 26, 2004:

1. Why only one police officer took notes?
2. If that is so how is it determined who will be designated to take notes?
3. Are records kept when people are placed in cells?
4. Do the police record the names of any paramedics called to the scene?

The HRP responded to each question:

1. If an offence is a minor one, only one police officer called to the scene would keep notes.

2. Normally the primary unit on the call is responsible for reports, notes and facts unless there is a specific requirement for another unit to do so.

3. Information is kept on all parties put in cells.

4. This would depend on whether the assault is a serious one and, in that case, information would be kept on everyone with whom the police had contact.

Noting the answer to question 3, I suggested to the HRP that it disclose the information recorded on the Applicant's clients when they were kept in cells overnight. I said it was my view that these records were responsive to the application. The HRP agreed to provide them to the Applicant in their entirety since they contain the personal information of the clients only.

Conclusions:

Review FI-01-02, cited by the Applicant, involves a somewhat different decision by the HRP because another exemption, besides privacy protection, was cited. However, there are notable similarities. That case also involved a claim by an applicant that he was assaulted outside the same bar by the staff of the bar. The main issue in that Review was the incident notes from the security staff of the bar which were voluntarily provided to the HRP. At that time I was told that writing reports of incidents is a condition for employment at that bar. In that

Review, I recommended that the HRP disclose the security staff's incident reports with the names of those who wrote them severed and the police agreed.

In my view, the Application in this case is broad enough to include incident notes from the staff of the bar if there were any and if they were provided to the HRP. The HRP have assured me there were no staff incident reports.

The Supreme Court of Nova Scotia in *Cyril House,* S.H. 16055, April 20, 2000 offers guidance in interpreting Section 20 of the FOIPOP Act which is Section 480 of the MGA. This Section is divided into four subsections. S.480(1) requires a public body to refuse to disclose personal information if disclosure would be an "unreasonable" invasion of the personal privacy of a third party; subsection (2) lists circumstances to be considered when determining whether disclosure would be an unreasonable invasion of personal privacy; subsection (3) lists the kinds of information which, if disclosed, would be presumed to constitute an unreasonable invasion of personal privacy; and subsection (4) lists nine circumstances which, if they apply, would lead to a conclusion that disclosure would not be an unreasonable invasion of personal privacy.

Justice Moir said the first step was to determine if the information at issue met the definition of "personal information" found in **Section 461(f)**. If it does then the next step is to examine s.480(4) to determine whether disclosure would constitute an unreasonable invasion of privacy. If that is so, to use Justice Moir's words, "that is the end." Section 480(4) "does not create rebuttable presumptions" and there is no need to consider subsections (3) or (2).

If s.480(3) applies, one is obliged to consider all relevant circumstances including the circumstances listed in s.480(2).

Section 498(2) places the burden of proof on the Applicant to show why disclosing the names of the witnesses and others would not constitute an unreasonable invasion of personal privacy.

The severed information contains the names and other identifying information of witnesses who spoke to the HRP. This information meets the definition of "personal information" in the **Act.** I have concluded the severed information does not match any of the conditions found in s.480(4).

HRP claims that s.480(3)(b) applies because the severed information "was compiled and is identifiable as, part of an investigation into a possible violation of the law." I agree, but to follow the decision in *Cyril House,* the HRP was obliged to consider the "relevant circumstances" in s.480(2), and balance them with a third party's rights to privacy. The relevant circumstances to consider are:

> (a) the disclosure is desirable for the purpose of subjecting the activities of the municipality (the police) to public scrutiny;
>
> (c) the personal information is relevant to a fair determination of the applicant's rights;

The HRP gave no indication it considered the circumstances in s.480(2). The Applicant offered no arguments to support his view that disclosing the names of witnesses would not constitute an unreasonable invasion of their privacy.

In my view, parts (a) and (c) are arguable. With respect to (a), while the HRP is required by this **Section 462** of the **Act** to be fully accountable to the public, this requirement does not remove its mandatory obligation to deny personal information if disclosing it would be an unreasonable invasion of a third party's personal privacy. Most of the severed parts of the police notes and the "incident history" which were denied to the Applicant contain the names of witnesses. Disclosing their identities without their consent would, in my view, constitute an unreasonable invasion of their personal privacy.

With respect to part (c), I've seen nothing that would lead me to conclude that the names of the witnesses are "relevant to a fair determination of the applicant's rights."

I note that the HRP have indicated that there is no information in the records, severed or not, that identifies any individual as a bouncer.

While the Applicant's concern for the paucity of records is understandable, I am assured by the HRP that the records provided to me, and to the Applicant in severed form, together with the information about the three men's time in the cells, are the only ones responsive to this application.

Recommendations:

That the HRP disclose, in addition to the 'cell notes', from the police officer's notes the last two lines under W1 and the final portion of the W2 notes starting with 'W1, W2'.

Section 493 of the Act requires the responsible officer 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 that decision. If a written decision is not received within 30 days, the Halifax Regional Police is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 28th day of April, 2004.

Darce Fardy, Review Officer