

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

A REQUEST FOR REVIEW of a decision of **CHILDREN'S AID AND FAMILY SERVICES OF COLCHESTER COUNTY** to provide a solicitor with an applicant's personal file.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **March 9, 2004**

ISSUE: Whether the decision of Children's Aid and Family Services of Colchester County to provide its solicitor with a copy of the Applicant's personal file, without his consent, is contrary to the requirements of the Act.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act** (FOIPOP), received at our office on January 14, 2004, the Applicant asked that I recommend to the Children's Aid and Family Services of Colchester County (the Agency) that it no longer provide its outside solicitor with copies of personal information files without the consent of the individuals the information is about.

In addition to complaining about the disclosure of his personal information the Applicant also claimed that the solicitor for the Agency was in conflict of interest because he was a member of the same law firm as the Applicant's solicitor. On that complaint I suggested to the Applicant that he file his concerns with the Nova Scotia Barristers' Society.

The issue arose after the Applicant applied to the Agency for records containing his personal information. The application was responded to by the solicitor for the Agency. Some records were provided to the Applicant by the solicitor.

The Applicant's submission to the Review:

The Applicant said that the Agency should not have provided his personal information to its solicitor without his consent. He said he was disturbed to learn that his personal information had been provided to a solicitor who did not work within the Agency.

The submission of the agency's solicitor:

The solicitor wrote that a public body is entitled to seek legal counsel and have legal counsel respond to applications on its instructions. He said his firm was "acting on behalf of the head of the public body at the request of the head of the public body at all times as their retained counsel. We provide them with advice and then disclose information based on their instructions . . . We advise the Agency and they make the decision."

The issue in dispute is whether the decision of the Agency to provide its solicitor with a copy of the Applicant's personal file is in accordance with the rules for the disclosure of personal information found in **Section 27** of the **Act**:

Disclosure of personal information

27 A public body may disclose personal information only

(a) in accordance with this Act or as provided pursuant to any other enactment;

(b) if the individual the information is about has identified the information and consented in writing to its disclosure;

(c) for the purpose for which it was obtained or compiled, or a use compatible with that purpose;

(d) for the purpose of complying with an enactment or with a treaty, arrangement or agreement made pursuant to an enactment;

(e) for the purpose of complying with a subpoena, warrant, summons or order issued or made by a court, person or body with jurisdiction to compel the production of information;

(f) to an officer or employee of a public body or to a minister, if the information is necessary for the performance of the duties of, or for the protection of the health or safety of, the officer, employee or minister;

(g) to a public body to meet the necessary requirements of government operation;

(h) for the purpose of

(i) collecting a debt or fine owing by an individual to Her Majesty in right of the Province or to a public body, or

(ii) making a payment owing by Her Majesty in right of the Province or by a public body to an individual;

(i) to the Auditor General or any other prescribed person or body for audit purposes;

(j) to a member of the House of Assembly who has been requested by the individual, whom the information is about, to assist in resolving a problem;

(k) to a representative of the bargaining agent who has been authorized in writing by the employee, whom the information is about, to make an inquiry;

(l) to the Public Archives of Nova Scotia, or the archives of a public body, for archival purposes;

(m) to a public body or a law-enforcement agency in Canada to assist in an investigation

(i) undertaken with a view to a law-enforcement proceeding, or

(ii) from which a law-enforcement proceeding is likely to result;

(n) if the public body is a law-enforcement agency and the information is disclosed

(i) to another law-enforcement agency in Canada, or

(ii) to a law-enforcement agency in a foreign country under an arrangement, written agreement, treaty or legislative authority;

(o) if the head of the public body determines that compelling circumstances exist that affect anyone's health or safety;

(p) so that the next of kin or a friend of an injured, ill or deceased individual may be contacted; or

(q) in accordance with Section 29 or 30.

Conclusions:

Many, if not most, public bodies consult their solicitors when they receive applications for access to records under the FOIPOP Act. It is not an unusual practice for smaller public bodies to use outside legal advice instead of having a solicitor on staff. I see nothing in this practice that is not “in accordance with this Act,” to use the words in s.27(a).

This case is distinctive because it was the outside solicitor who signed the letter of decision sent to the Applicant and who wrote the decision on his law firm’s letterhead. Public

bodies should make the decisions on applications for access under this **Act**, perhaps on the advice of a solicitor, and they should sign the letters of decision.

The **Act** empowers the “head of a public body” to make decisions on applications made under the FOIPOP Act. Section 3(c) provides a definition for “head of a public body”

“head,” in relation to a public body, means

(i) where the public body is a department, branch or office of the Government of Nova Scotia, the minister who presides over it,

(ii) where the public body is a board, commission, foundation, agency, tribunal, association or other body of persons reporting directly to a minister in respect of its day-to-day operations, the minister,

(iii) where the public body is a board, commission, foundation, agency, tribunal, association or other body of persons not reporting directly to a minister in respect of its day-to-day operations, the chair or presiding officer of the board, commission, foundation, agency, tribunal, association or other body of persons,

(iiia) where the public body is a local public body, the person or group of persons designated pursuant to Section 49A as the head, or

(iv) in any other case, the person designated by the regulations as the head of the public body;

Section 44(1) and (2) allows the head of a public body to “delegate to one or more officers of the public body” the power to make decisions on FOIPOP applications. Such delegation must be “in writing.”

In this case there appears to have been no delegation of power to the solicitor even if it could be argued that he is acting as an officer of a public body.

While it makes sense for small public bodies to retain outside counsel instead of hiring one as a member of staff, it is important that public bodies not only make the decisions but be seen to be making them. That did not happen in this case and it was reasonable for an Applicant to conclude that the solicitor was provided with the application and relevant records for his decision, and to pass that decision on to the Applicant.

Recommendations:

The Agency in the future should convey any decision to a FOIPOP Applicant over the signature of the head of the Agency or to a person to whom that power has been properly delegated.

The Agency should explain to the Applicant, in writing, its reasons for denying access to some records or parts of records which he asked for and cite the exemptions from the **Act** which support its decision. (The solicitor cited exemptions in a letter to the Review Officer but not in the letter of decision to the Applicant.) This letter to the Applicant should be accompanied with the advice that if he is not satisfied with the decision he may ask the Review Officer to review the decision.

Section 40 of the Act requires the Agency 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.

Dated at Halifax, Nova Scotia this 9th day of March, 2004.

Darce Fardy, Review Officer