

**PART XX OF THE MUNICIPAL GOVERNMENT ACT  
(FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY)**

**A REQUEST FOR REVIEW** of a decision of the **TRURO POLICE SERVICE** to deny access to records related to an investigation of an incident in which the Applicant was involved.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** October 18, 2004

**ISSUE:** Whether the exemptions from disclosure cited by the Truro Police Service support its decision to refuse to disclose the records requested: **Section 475** (harm to law enforcement) and **Section 480** (protection of personal privacy).

In a Request for Review under the **Part XX of the Municipal Government Act**, received February 13, 2004, the Applicant asked that I recommend to the Truro Police Service (the Police) that it disclose the records he requested.

The Applicant wants copies of “all files and reports” related to the investigation into his complaint against a police officer. The Police refused the application (although it later agreed, during this Office’s mediation process, to provide parts of some of the records). It cited exemptions from disclosure under **Section 475(1)(a)(c) and (g) and (2)(b)**, **Section 480(2)(f), (3)(b) and (g)** and **Section 481(3)**. The relevant sub-sections to be considered read:

**475 (1)** The responsible officer may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm law enforcement;

(c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used in law enforcement.

(g) deprive a person of a right to a fair trial or impartial adjudication.

(2) The responsible officer may refuse to disclose information to an applicant if the information is

(b) in a law enforcement record and the disclosure could reasonably be expected to expose, to civil liability, the author of the record or a person who has been quoted or paraphrased in the record

**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.

(2) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the responsible officer shall consider all the relevant circumstances, including whether

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

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

(b) 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;

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

**481(3)** The responsible officer shall disclose to an applicant a report prepared in the course of inspections by an agency that is authorized to enforce compliance with an enactment.

*Background:*

The Applicant was involved in a street demonstration protesting the length of time it was taking to have power restored to his neighbourhood after Hurricane Juan. An altercation followed between the Applicant and a police officer. The Applicant subsequently filed a complaint with the Truro Police Service which asked the New Glasgow Police Service to investigate. A report was prepared by the New Glasgow Police Service and provided to the Truro Police Service.

Meanwhile, the Applicant has filed notice to take legal action against the Town of Truro.

The records at issue are:

1. the investigation report of the New Glasgow police officer which includes summaries of witness statements;
2. a letter to the investigating officer from a policing consultant for the Department of Justice, Policing and Victim Services; and
3. copies of the complete statements made by witnesses to the incident.

All of the witnesses who gave statements were notified, as third parties, of the Application and asked if they consent to disclosure. None of the witnesses gave consent.

*The Applicant's submission:*

The Applicant claims that the investigating officer from New Glasgow had assured him he would receive a copy of the investigation report. He said he doesn't understand how disclosing the investigation report would harm law enforcement or harm the effectiveness of investigative techniques.

*The written and oral submission of the Truro Police Service:*

This submission does not address directly the claim that law enforcement would be harmed by the disclosure of the investigation report and the witness statements. But it says disclosing the investigation report, which expresses the conclusions of the investigating officer and his evaluation of the actions of the Applicant and the Truro police officer, could expose the report's author to a civil action of defamation. It contends that s.480(3)(g) also applies because the report contains the author's personal recommendations and evaluations.

**Conclusions:**

S.481(3) cannot be cited as an exemption because it doesn't apply to police investigations.

The Supreme Court of Nova Scotia has provided guidance in determining whether disclosing personal information would constitute an unreasonable invasion of personal privacy:

Step 1: Determine if the information meets the definition of "personal information" found in s.461;

Step 2: Consider whether any of the provisions of s.480(4) apply. If they do there is no need to consider sub-section (2) or (3);

Step 3: Determine if the information is presumed to be an unreasonable invasion of personal privacy pursuant to sub-section (3);

Step 4: If (3) applies then all relevant circumstances, including those in sub-section (2) must be considered.

Because s.480 is a mandatory exemption I feel obliged to consider sub-sections not cited by the Police.

I find that all three records contain some of the personal information of witnesses and other third parties as defined in **Section 461(f)**. The opinions of the investigating officer in Record #1 and of the policing consultant in Record #2 do not constitute his “personal information” of the authors, as defined. These opinions are the personal information of the person they are about.

In records #1 and #3, I am satisfied that disclosing the identities of the witnesses with their statements would constitute an unreasonable invasion of their personal privacy. However, sub-section (5) of s.480 requires the Police to provide the applicant with a summary of the witness statements “unless the summary cannot be prepared without disclosing the identity of” the witnesses. In my view, this is possible.

It is my opinion that disclosing the names of police officers named in the records would not be an unreasonable invasion of their personal privacy. They are public officials and their personal information is connected to their public responsibilities.

With respect to Section 475 the burden of proof is on the Police to prove the harm alleged (**Section 498**).

**498(1)** At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the responsible officer to prove that the applicant has no right of access to the record or part.

In this case, the Police claim that disclosing the investigation report would “harm law enforcement,” “harm the effectiveness of investigative techniques” and expose the author of the report to civil liability. It notes that the Applicant has already filed notice of action against the Town of Truro.

In my Review FI-01-134, I address the “proof of harm” issue. The Federal Court of Appeal has ruled that while proof of harm does not require “detailed and convincing evidence” there needs to be evidence “of a reasonable expectation of probable harm” (underline added) [*Canada Packers Inc. v. Canada (Minister of Agriculture)* (1998), 53 D.L.R. (4<sup>th</sup>) 246].

The same Court, in *Rubin v. Canada (Minister of Transport)* 1997), 221, N.R. 145 (Fed. C.A.), 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 a ruling of the Nova Scotia Court of Appeal, Justice Bateman concluded “that the legislators, in requiring “a reasonable expectation of harm,” must have intended that there be more than a possibility of harm to warrant refusal to disclose a record.” [*Unama’ki v. Chesal* (2003) NSCA 124].

In my view, although the Applicant has filed notice of action against the Town there is there is no “reasonable expectation” that the author of the investigation report, which contains the investigator’s summary of witness statements and his evaluation of them, could be exposed to a civil action of defamation.

There is also no evidence that disclosing the policing consultant’s letter would reasonably be expected to harm law enforcement or expose the author to civil litigation.

**Recommendations:**

- That the Truro Police Service disclose to the Applicant a copy of Record #1 titled *Public Complaint Investigation* after severing the names of witnesses and any other information that could reasonably be expected to identify them.
- that the Police also disclose Record #2, from a policing consultant to the investigating officer of the New Glasgow Police Service. dated December 5, 2003.

(Attached to the copy of this Report sent to the Police, are copies of the investigation report and the letter from the policing consultant, with the severing of identifying information. For ease of reference, the paragraphs which the Truro Police Service have agreed to release through mediation are also marked.)

**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 Truro Police Service is deemed to have refused to follow these recommendations.

**Dated** at Halifax, Nova Scotia this 18<sup>th</sup> of October, 2004.

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Darce Fardy, Review Officer