REPORT **FI-05-33**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF JUSTICE** to withhold parts of a "Policing and Victim Services File."

REVIEW OFFICER: Darce Fardy

REPORT DATE: October 24, 2005

ISSUE: Whether the exemption under Section 20(1) of the *FOIPOP Act* (personal information) supports the decision of the Department of Justice to deny access to some parts of a file.

In a Request for Review, dated June 3, 2005, under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), the Applicant asked that I recommend to the Department of Justice (the Department) that it reverse its decision and provide him with all the information he asked for.

The Applicant is the solicitor for a youth who was assaulted and injured in March 2004. With the consent of the youth, the solicitor asked for the complete copy of the Department's Policing and Victim Services file on the matter. The Department agreed to provide most of the file but denied parts of it because it felt disclosing it would constitute an unreasonable invasion of the privacy of third parties and was therefore exempt under **Section 20** of *FOIPOP*.

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
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> (f) the personal information has been supplied in confidence;
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> (g) the personal information is likely to be inaccurate or unreliable; and
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> (h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.
>
> **(3)** A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
>
> (a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;
>
> (b) the personal information 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) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;
>
> **(4)** A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if . . .

The Department also told the Applicant that Sections 110 and 111 of the *Youth Criminal Justice Act* (*YCJA*) "prohibits the publishing the name of young persons if it would identify

the young person as a young person dealt with under the *YCJA* or as having been a victim or witness in connection with an offence."

The Department's submission:

Following the procedure laid down by Nova Scotia Courts to use in interpreting s.20, [*Cyril House and 144900 Canada Inc.* (1999) unreported; *Dickie v. Nova Scotia (Department of Health*) C.A. No. 148941 (1999)], the Department concluded that s.20(4) does not apply to the withheld information. The Department then considered s.20(3). The Department believes that s.20(3)(a), (b) and (g) may apply because "[t]he excluded records contain personal information regarding potential witnesses as well as personal information on the accused and on the case worker." Having determined that s.20(3) applies, it then considered the criteria found in s.20(2)(f), (g) and (h).

The Department recognizes that the *YCJA*, a federal statute, is not listed as a law prevailing over *FOIPOP*, but adds "we consider the obligations of the *YCJA* to take precedence over the *Freedom of Information and Protection of Privacy Act* when dealing with information on young persons who have been dealt with under the legislation."

The Department also refers to this Province's *Youth Justice Act* (formerly the *Young Persons Summary Proceedings Act*) which prohibits "the publication of a report which would disclose the name of a young person, a person under of eighteen years of age aggrieved by, or the victim of, the offence, or a person who appeared as a witness in connection with an offence." However, the submission adds, the provincial legislation does not apply in this case because the charges were laid under the federal statute (*YCJA*).

The submission summarizes the case for denying access:

- Section 20(4) does not apply;
- Section 20(3) applies because the information contains medical information, criminal investigation records and personal opinions;
- This presumption is not rebutted by any of the factors found in s.20(2) because the information was supplied in confidence and its disclosure would be harmful;
- There is no discretion to disclose once it is determined that disclosure would constitute an unreasonable invasion of personal privacy; and
- There is a requirement to consider the restrictions found in the *YCJA*.

. . .

When s.20 is applied, the burden of proof is on the Applicant. [See Section **45 (2)** of *FOIPOP]* Although the importance of this was clearly explained by the Review Office, the Applicant did not respond to the invitation to make a submission.

Conclusions:

I agree with the Department that the *YCJA* should be considered but I do not agree that the federal statute "takes precedence" over *FOIPOP* or that there is a "requirement" under *FOIPOP* to consider *YCJA*. If the legislators intended this to be so it's reasonable to conclude it would have been included in Section 4A(2) which lists twenty-one statutes, parts of which prevail over *FOIPOP*.

It is unfortunate that the Applicant did not make a submission to this Review. At the same time it is also unfortunate that the Department, in its letter of decision, did not explain to the Applicant why it felt that disclosing the information would be an unreasonable invasion of a third party's personal privacy. The Department even neglected to name the subsections of s.20 it considered when making its decision. In a number of earlier Reviews, while commenting on a public body's failure to provide reasons for a decision, I have cited the words of Justice Edwards of the Nova Scotia Supreme Court who said that public bodies should "detail for the applicant the reasons why a particular exemption is operative. The mere recital of the words of a relevant section is not enough." *[McCormack v. Nova Scotia (Attorney General)* (1993) No.625] In my Review *FI-05-23* I wrote that even though the burden of proof is on the Applicant, it is incumbent on public bodies to provide an applicant with the reasons why it has decided that disclosing the information would be an unreasonable invasion of privacy.

Although I believe that the citing of s.20(3) may be arguable, without arguments from the Applicant I am prepared to accept the decision of the Department.

Recommendations:

That the Department reaffirm in writing to the Applicant, with a copy to the Review Officer, its decision to refuse to disclose the withheld personal information.

Dated at Halifax, Nova Scotia this 24th of October 2005.

Darce Fardy, Review Officer