FI-05-84

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the **South Shore Regional School Board** to withhold a report.

REVIEW OFFICER: Dwight Bishop

REPORT DATE: **April 13, 2006**

ISSUE: Whether Sections 14, 18 and 20 of the *Freedom of Information and Protection of Privacy* (*FOIPOP*) *Act* support the decision of the South Shore Regional School Board to withhold Report HR-061-05 and whether the Report can be severed in accordance with Section 5.

In a Request for Review, dated November 29, 2005, the Applicant requested I recommend to the South Shore Regional School Board (hereinafter referred to as the SSRSB) it release Report HR-061-05 and recommendations the Board may have made in response to the Report.

The Applicant, a third party, had originally requested a copy of Report HR-061-05 from the SSRSB and in-camera recommendations based on that Report. In its decision letter to the Applicant, the SSRSB stated it would not disclose the Report in its entirety on the basis of s.14, s.18 and s.20 of the *FOIPOP Act*. The SSRSB also stated it was unable to locate any records pertaining to recommendations based on Report HR-061-05. During the Review Office's mediation process, the Applicant was satisfied a reasonable search for recommendations was conducted, and agreed to

receive information pertaining to the nature of the Report and its findings.

The relevant sections of the *FOIPOP Act* for consideration are:

> **Advice to public body or minister**
> **14 (1)** The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.
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> **Health and safety**
> **18 (1)** The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, if the disclosure could reasonably be expected to
> (a) threaten anyone else's safety or mental or physical health.
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> **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.
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> **(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
> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
> (b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
> (c) the personal information is relevant to a fair determination of the applicant's rights;
> (d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
> (e) the third party will be exposed unfairly to financial or other harm;
> (f) the personal information has been supplied in confidence;
> (g) the personal information is likely to be inaccurate or unreliable; and
> (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
(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;
(d) the personal information relates to employment or educational history;
(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
(a) the third party has, in writing, consented to or requested the disclosure;
(b) there are compelling circumstances affecting anyone's health or safety;
(c) an enactment authorizes the disclosure;
(d) the disclosure is for a research or statistical purpose and is in accordance with s.29 or s.30;
(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;
(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;
(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;
(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or
(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

SUBMISSION OF THE PUBLIC BODY:

In considering s.14 of the *FOIPOP Act*, the solicitor representing the SSRSB submitted Report HR-061-05 contains advice and recommendations prepared solely for the SSRSB;

"as such, much (if not all) of the Report constitutes advice and recommendations to the SSRSB," and should be withheld under the SSRSB's discretionary authority provided by the *FOIPOP Act*.

In considering s.18(1)(a) of the *FOIPOP Act* the solicitor stated that releasing the substance of Report HR-061-05 could have a "deleterious effect" on the individuals named within the Report. The solicitor also addressed whether information contained in the Report could be reasonably severed pursuant to s.5(2) of the *FOIPOP Act*. The solicitor stated, "notwithstanding that actual identifying information regarding third parties could be severed, the community is small" and the identity of the third parties will become known from the "tone, tenor or substance of the information that remains." Due to the mix of personal information, the solicitor also stated "severance of the document would render it unreadable."

In considering s.20 of the *FOIPOP Act*, the solicitor relied on the guidelines set out by the Nova Scotia Court of Appeal in *Dickie v. Nova Scotia (Department of Health)* (1999), 176 N.S.R. (2d) 321 (C.A.) and addressed by the Nova Scotia Supreme Court in *Keating* v. *Nova Scotia (Attorney General)*, 2001 NSSC 85.

In interpreting s.20 of the *FOIPOP Act*, the courts provided guidance by posing four questions for public bodies to consider:

1. Does the information meet the definition of "personal information" found in s.3(1)(i) of the *Act*?
2. Are any of the conditions of s.20(4) of the *Act* met? Section 20(4) lists personal information which, if disclosed, would not constitute an unreasonable invasion of privacy.
3. Is the personal information presumed to be an unreasonable invasion of personal privacy pursuant to s.20(3) of the *Act*?

4. Does the balancing of all relevant circumstances found in s.20(2) of the *Act* lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy?

In keeping with the four step analysis set out by the courts, the solicitor first determined whether the information contained in Report HR-061-05 is considered personal information as defined by s.3(1)(i) of the *FOIPOP Act.* The solicitor submitted "it is evident that the Report contains extensive personal information about third parties" as defined by the *Act* and can, if released, identify the individuals involved.

Second, the solicitor determined whether disclosure of the personal information would not be deemed an unreasonable invasion of personal privacy pursuant to s.20(4) of the *FOIPOP Act*. The solicitor submitted none of the factors of s.20(4) applied and proceeded with the third step of the analysis which considers whether disclosure of the information would constitute an unreasonable invasion of privacy pursuant to s.20(3) of the *Act*. The solicitor submitted s.20(3)(b) of the *Act* can be applied to Report HR-061-05 because the information in the Report was compiled, and is identifiable as part of an investigation under the *Education Act* and SSRSB policy made pursuant to that *Act*. With respect to s.20(3)(d) and (g) of the *FOIPOP Act*, the solicitor submitted Report HR-061-05 contained both employment history and character evaluations of identifiable individuals, thus s.20(3) of the *FOIPOP Act* applies.

Having determined s.20(3) of the *FOIPOP Act* applies, the solicitor considered the fourth and final step in the analysis. Based on the various factors set out in s.20(2), including s.20(2)(e), (f) and (h) of the *FOIPOP Act*, and balancing all of the circumstances, the solicitor submitted the factors in this case favour non-disclosure.

SUBMISSION OF THE APPLICANT:

During the mediation process the Applicant accepted a reasonable search for possible recommendations had been conducted by the SSRSB. The Applicant also recognized Report HR-061-05 consisted mostly of third party personal information. As such, the Applicant narrowed the scope of the review to the release of information pertaining to the nature of the Report and its findings. The Applicant stated, "in the interest of keeping...school boards open, accountable and transparent to the public they serve, my request for the release of the rest of the report I have requested stands."

ANALYSIS AND FINDINGS:

The crux of the issue is whether Report HR-061-05 can reasonably be severed. I agree with the submission of the SSRSB that s.20 of the *FOIPOP Act* has direct application in this case, and portions of the Report contain a mix of personal and non-personal information. Having said that, I believe there are aspects of the Report that require consideration under the severance provision of the *FOIPOP Act*, specifically s.5(2).

Regarding s.14 (advice) and s.18 (health and safety) of the *FOIPOP Act*, I do not agree these provisions are applicable to the Report in its entirety. The submission of the SSRSB states "[t]he Report is considered to be a reliable version of events." This statement, coupled with a plain reading of the document leads me to conclude the nature of the complaint and the findings of Report HR-061-05 are factual in nature, therefore do not meet the definition of advice pursuant to s.14 of the *FOIPOP Act* as set out by the Nova Scotia Supreme Court in *O'Connor v. Nova Scotia*,

NSSC 6 (2001). With respect to s.18(1)(a) of the *FOIPOP Act*, I am satisfied health and safety issues do not exist as the identities of those named in the Report can reasonably be protected.

Turning to s.5(2) of the *FOIPOP Act*, I am satisfied Report HR-061-05 can be severed without disclosing the identities of individuals contained within the Report. Although the SSRSB provided in its submission releasing the Report in any part could identify the individuals involved, it appears to me given the breadth of the SSRSB's jurisdiction; and the Applicant's restated interests, that the nature of the complaint and findings of the Report can be released while balancing the interests of accountability and privacy.

RECOMMENDATIONS:

That the SSRSB disclose to the Applicant:

(a) paragraph 72 (found on page 16 of Report HR-061-05);

(b) paragraph 106 (found on page 24 of Report HR-061-05);

(c) paragraph 111 (found on page 25 of Report HR-061-05).

Section 40 of the *FOIPOP Act* requires the South Shore Regional School Board (SSRSB) to make a decision on the above recommendations within thirty 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 thirty days, the SSRSB is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 13th day of April 2006.

Dwight Bishop
Acting Review Officer