REPORT **F1-06-71(M)**

PART XX, MUNICIPAL GOVERNMENT ACT –
FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

A **REQUEST FOR REVIEW** of a decision by the **HALIFAX REGIONAL POLICE** to deny access to personal information about the Applicant contained in a police record.

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY REVIEW OFFICER:
Dulcie McCallum

REPORT DATE: April 03, 2007

ISSUE: Whether the Halifax Regional Police has met the burden of proof to justify the denial of access to personal information about the Applicant contained in a police record and whether the exemptions cited support its decisions on denying the severed information.

BACKGROUND

In a Request for Review made under the Freedom of Information and Protection of Privacy legislation in **Part XX of the *Municipal Government Act [MGA]*** dated November 7, 2006, the Applicant, through his lawyer, asked that I conduct a Review as to whether the Halifax Regional Police ["Police"] had failed to disclose the information about the Applicant in response to his request.

In a written request to the Police, dated August 16, 2006, the Applicant, filed a Form 1 requesting access to the "file contents [Police file GO#06-35459] in whatever form (e.g., notes, letters, forms, electronic or digital files)" about "both the applicant's own personal information and other information."

On September 11, 2006, the Police disclosed a portion of the record and severed some information. With regards to the information withheld, the Police, in its letter of decision to the Applicant cited several sections of the *MGA*, which are reproduced below. There was no other explanation or reasons given to the Applicant by the Police for the exclusion of the information severed.

EXEMPTIONS CLAIMED BY THE PUBLIC BODY

Refusal to disclose information

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

(f) reveal any information relating to, or used in, the exercise of prosecutorial discretion;

Health and safety

478 (1) The responsible officer 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;

Personal Information

480 (1) The responsible officer may 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 continue the investigation;

On November 7, 2006 the Applicant filed a Form 7, a Request for Review, with our Office with respect to the decision made on January 11, 2006 by the Police. The Request stated:

"The disclosure permitted fails to show information about how the subject [Applicant] is supposed to have acted or behaved at the times noted in the documents. This is information about [the Applicant] that is being sought - not that of [Third Party] or [Other]."

The Applicant requested that the Review Officer recommend that:

"The responsible officer of the municipality give access to the record as requested in the Application for Access to a Record."

The Request for a Review was referred to mediation. The mediation was unsuccessful in resolving this matter.

On January 11, 2007 this office asked the Police for a written submission emphasizing that pursuant to s. 498(1) "the burden is on the responsible officer [of the Public Body] to prove that the applicant has no right of access to the record or part." On January 19, 2007 the Police made the following submission:

> *"The majority of the information was provided in confidence and was compiled as part of an investigation into a possible violation of law. It is the opinion of the FOIPOP Administrator that disclosure of this severed material could reasonably be expected to threaten the safety, mental or physical health of the complainant in this matter."*

The author of that submission went on to refer to the Police correspondence to the Applicant, in which they cited the sections of the *Act* used in processing the original application for access to a record.

The Third Party was contacted by the Review Office and given the opportunity to make a submission, which she did. Her letter states that the Applicant's request for ***her file*** was symptomatic of the pattern of his behaviour in the past. Understandably the Third Party is concerned if access is being given to her personal information. In this regard, the Applicant is not seeking access to ***her file***. The Applicant is seeking only his personal information contained in the police record. She refers to a history of problems with the Applicant in the past but gives no specific examples involving safety or harm.

By a letter dated January 23, 2007, the Applicant, through his lawyer, advised that they did not see the need to file anything further other than what had been supplied as the communications by his client and himself to the Police.

RECORD AT ISSUE

The Police record, marked Doc A, consists of a General Occurrence record, which includes an ongoing exchange of emails between the Third Party and the investigating police officer. The record in issue is the police file dating from March 28, 2006 [date of first contact with the police by the Complainant/Third Party] to August 16, 2006 [date of request for the record from the Applicant] regarding a complaint made by the Third Party to the Police that a former boyfriend was stalking her.

THE NEED TO PROVIDE REASONS FOR EXCLUSION OF A RECORD

It is important at the outset to emphasize the importance of the completeness of the initial correspondence between a public body and an Applicant. In this case, where a substantial portion of the record was denied to the Applicant, it was incumbent for the Police to provide full and adequate reasons for the refusal. I rely on *McCormack v. Nova Scotia (Attorney General) (1993), Can Lll 3401 (NSSC), at para. 3* where Justice Edwards stated:

> *"Upon receiving a request the Minister should be mindful that the purpose of the Act is to provide for the disclosure of all Government information with necessary exemptions that are limited and specific (s. 2). The Act creates a right of access to information (s.*

4(1)). The Minister ought to keep in mind that disclosure can only be refused if the requested information fits squarely within one of the exemptions in the Act.

Secondly, when the Minister determines that an exemption applies, she should tell the applicant that she has read (or been briefed upon) the requested information and, insofar as possible, ***should detail for the applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough." [emphasis added]***

In the case at hand, the Police failed to provide any reasons and simply listed sections of the statute to justify the severed parts of the record. The Applicant's request was very specific in seeking access to his personal information, specifically naming the individuals he did not want information about. The onus rests with the public body in such cases to justify reliance on one of the statutory exemptions. Giving details to the Applicant is particularly important in such cases so as to enable him to understand how the circumstances of his case fall within the parameters of one of the exemptions.

In its final submission to this Office [quoted above], the Police indicated that the information was:

- provided in confidence;
- was compiled as part of an investigation into a possible violation of the law; and
- the disclosure of the severed material could reasonable be expected to threaten the safety, mental or physical health of the complainant.

This is the kind of detailed information that more properly should have been shared in response to the initial response to the Applicant, with additional evidence to support the rationale. Section 498(1) of the *MGA* makes it patently clear that:

"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."

I will deal with each of the sections relied upon by the public body to refuse access separately.

REFUSAL TO DISCLOSE INFORMATION – s. 475(1)(f)
[PROSECUTORIAL DISCRETION]

There is only one reference to a prosecutor in the record in issue. On page 20/24 there is a note that the file had been dropped off to the attention of the Crown Prosecutor. There is no information as to how this file was treated by that Prosecutor's office. There is a note on the file that "no further action" indicating charges would not be filed.

The Police cite s. 475(1)(f) of the *MGA* to withhold any information that may interfere with the exercise of "prosecutorial discretion." While the Nova Scotia legislation does not define the phrase, a useful definition can be found in the access to information legislation in BC which provides:

*"**exercise of prosecutorial discretion"** means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the Crown Counsel Act, including the duty or power*

(a) to approve or not to approve a prosecution,
(b) to stay a proceeding,
(c) to prepare for a hearing or trial,
(d) to conduct a hearing or trial,
(e) to take a position on sentence, and
(f) to initiate an appeal.
[RSBC 1996] c. 165, Schedule 1.

There is no information contained in the severed portion of the record that relates to any of the duties or powers listed above and that would point to interfering with prosecutorial discretion. Section 475(1)(f) of the *MGA,* therefore, has no application to this case.

HEALTH AND SAFETY – s. 478(1)

Physical and psychological abuse of, as well as violence against, women is a significant problem that plagues communities everywhere. Police are, understandably, on heightened alert to this problem. In this case, however, neither the Police nor the Third Party supplied the Review Office with any evidence that the Applicant poses a threat to health or safety. There must be a "rationale connection" between the threat to health and safety and the disclosure.

> *"Although [section] involves the same standard of proof as other sections of the Act, the importance of protecting third parties from threats to their health or safety means public bodies in the Ministry's position should act with care and deliberation in assessing the application of this section. A public body must provide sufficient evidence to support the conclusion that disclosure of the information can reasonably be expected to cause a threat to one of the interests identified in the section. There must be a rational connection between the disclosure and the threat." [(2000) Order 00-02 BCIPC]*

By her account, the Third Party complains about the Applicant for being inappropriate, invasive, controlling, annoying or overzealous in his attempts to regain favour with her but her

account did not amount to a safety or health issue. The following facts lead me to this conclusion:

- there is no reference to the Applicant having any criminal record of violence or domestic abuse;
- there was no evidence provided of domestic violence;
- according to the record, there was insufficient evidence for the Third Party to get a restraining order;
- the Applicant continued to have a relationship with family members of the complainant;
- there were no charges laid against the Applicant; and
- the record released by the Police to the Applicant provides sufficient details to identify the Third Party if the Applicant was seeking to do so by his Application.

Section 478(1) of the *MGA* has no application in this case. The Police, therefore, in exercising their discretion to refuse access based on a threat to the personal health and safety of a Third Party, did so in error. Having said that it would, however, be wholly inappropriate for the Review Officer to exercise the statutory discretion in a manner she sees fit and make a substitute decision for the police. What is appropriate is for this matter to be referred back to enable the Police to reconsider the matter in accordance with the Recommendations below.

PERSONAL INFORMATION – s. 480(1), (2), (3)

Section 480(1) is a mandatory exemption that requires the public body to refuse to disclose personal information if disclosure would be an unreasonable invasion of a Third Party's personal privacy. The Applicant in this case does not want access to the Third Party's information, as is clearly stated on his Form 7. Section 480 raises two separate issues, which are:

- Will the disclosure to the Applicant result in the unreasonable invasion of a Third Party's personal privacy? In determining if there is the potential for such an invasion of privacy, the responsible officer is to consider all the relevant circumstances including – was the information supplied in confidence?
- Does the presumption that where there is an unreasonable invasion of a Third Party's personal privacy where identifiable information is supplied as part of a criminal investigation apply in this case?

It would be understandable if the Third Party assumed her contact with the Police was done on a confidential basis as many people remain unaware or unfamiliar with the access to information legislation and the fact that it applies to municipal police. The complainant as a Third Party was entitled to make a submission to the Review Office, which she did. That submission made no reference to the fact that she thought she had supplied the information to the police on a confidential basis. She did mistakenly refer to the Police record as ***her file.*** The Police in its final submission states that the majority of information was supplied on a

confidential basis but this is not backed up by how the information is recorded or by what is in the submission by the Third Party and no further details were provided to show such was the case.

A person's right to access ***their own personal information supplied by a Third Party*** cannot be denied simply because the person supplying it believes it was in confidence.

> *"It appears that the Legislature has, in s. 3(1)(i)(ix)[s. 461(f)(ix)], come to grips with one aspect of a clash inherent to a legislative scheme that attempts to balance access to information and protection of privacy. The clash arises where one person addresses a public body about another. The person who is the subject of the communication may have an interest in knowing what information was given, and the person also has a privacy interest at stake if others seek access to a record of the communication. The person who provided the information may also have a privacy issue at stake, where, for example, the information was provided in confidence. The interests of the two are mutually exclusive. The effect of the [section] is to come down on the side of the person spoken about where the information is a personal view or opinion about that person. Thus, if one asserts fact about another and the information is recorded, it is "recorded information about an identifiable individual." [French v. Dalhousie University (2002), NCSC 22 (Can Lll), at para 17.*

The Applicant has a statutory right of access to any record in the custody of a municipality pursuant to s. 465 of the *MGA* subject to statutory exemptions. This is consistent with the purpose of the legislation contained in s. 462(a)(ii) of the *MGA* that provides that municipalities are to be fully accountable by giving individuals access to records. The Applicant was very clear in his request that he was seeking access to only personal information about him and not about any other person or Third Party. Section 461(f) states that personal information means "recorded information about an identifiable individual."

The dates and times of events contained in the record that are about the Applicant are the very kind of information to which the Applicant is entitled. He is allowed access so that he can make an application to amend or correct if he feels the information is incorrect or simply to know what was recorded about him. He is not entitled, nor did he request, personal information about any Third Party.

The Applicant was aware that a file had been opened and an investigation was ongoing. The investigating police officer who received the initial complaint and who continued to be assigned to the file contacted the Applicant to advise him of this fact. The record indicate that the police officer attended at the Applicant's home and requested he contact him by a leave of his business card. When the he called the police officer, the Applicant was told that while no charges had been laid that a file had been created and an investigation was ongoing into an allegation that he was stalking a former girlfriend.

Therefore, the presumption contained in s. 480(3) of the *MGA* would apply here if the personal information was compiled as part of an investigation into a potential violation of the law but only if it is information about a Third Party. In those cases, the onus shifts to the

Applicant to demonstrate that the presumption should not apply. However, where the Applicant seeks ***personal information about himself*****,** the onus rests with the public body to demonstrate that disclosure would be an unreasonable invasion of someone else's privacy. While there is information about a Third Party that should be withheld, I find that the Police could provide much greater information to the Applicant about himself without compromising the privacy of the Third Party.

RECOMMENDATIONS

I make the following recommendations:

1. The Police revisit this Application and re-exercise its discretion under s. 480 of the *Act* keeping the discussion in this Review in mind and thereafter give due consideration to the release of additional portions of the Record that were previously severed. It is important that what remains after a more detailed and sensitive severing must be comprehensible and not so fragmented as to be useless. It is important to point out the inconsistencies in what was disclosed. The Police released a portion of the record to the Applicant with details sufficient enough to disclose who the complainant was [page 3/24] yet severed exactly the same information contained on the next page 4/24. This example cannot be remedied but is cited to recommend that during the reconsideration, consistency in approach be factored in. It is recommended that you review the record once again and a new copy of the record be provided to the Applicant containing those dates and events relating specifically to the Applicant in greater detail, including views and opinions that are recorded about him. In order to assist the public body, four pages of the record in issue have been attached to this Review Report for the Public Body only demonstrating how the information might more appropriately be severed. This sample of a severed record will, of course, not be made public nor will it be posted on our website when the Review is uploaded.

2. For that portion of the record that will continue to be severed, it is recommended that the Police provide the Applicant with specifics as to why the information cannot be made available. This would include that portion of the record that contains personal information about the Third Party and that contains no personal information about the Applicant.

Section 493 of the *Act* requires the Halifax Regional Police 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 3rd day of April, 2007.

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Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer