REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-07-58

Report Release Date: June 3, 2009

Public Body: Nova Scotia Environment [Formerly Department of Environment and Labour]

Issues:

1. Did Nova Scotia Environment ["Environment"] conduct an adequate search for the responsive Record?
2. Was the information included in the disclosure decisions open, accurate and complete in accordance with the duty to assist?
3. Does s. 15 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"] allow Environment to withhold a record relating to an ongoing investigation?

Record at Issue: The Record requested has now been released to the Applicant and is not the subject of this Review. The issue of whether Environment properly exercised its discretion under the exemption in ss. 15(1)(a) and (c) of the *Act* with respect to withholding information during an active investigation remains at issue in this Review. The portion of the Record at issue concerns documents that were withheld in full because they were part of an investigation being done by Environment. The documents at issue, referred to as the Record, were also found in a file referred to as both the "Evidence" and "Investigation" file.

Findings:

1. The initial Request for Review made by this Applicant was with respect to a deemed refusal. This was subsequently resolved when Environment apologized and provided a response to the Applicant. Environment, in addition to the apology, offered to reopen the file to permit a further request from the Applicant without charge on a one time basis. The issue of the deemed refusal is not the subject of this Review. The matter of

delay, however, is in issue. Environment took 71 days to provide its first decision. I find the issue of timing was sufficiently raised on the Form 7 by the Applicant. Regardless of whether the Amended Form 7 raised the issue of delay, I agree with precedent and the Applicant that the issue of delay is deserving of comment. Notwithstanding that the deemed refusal was cured by Environment making a decision and providing access to some of the Record, I find Environment exceeded the timelines under the statute thus interfering with the Applicant's ability to receive the information requested in a timely fashion. This failure to respond without delay was inconsistent with the duty to assist.

2. The head of a public body can delegate the processing of Applications for Access to a Record to a person usually referred to as the Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator. As part of the FOIPOP Administrator's role to make a decision, it is his/her duty to assist applicants and to provide a response openly, accurately and completely. In most instances, as a question of best practice, this will include providing an Index of Records either at the time of a public body's initial decision to provide or refuse access to an applicant or at the very least at the time the record is provided to the Review Office once a Form 7 has been filed.
3. Pursuant to ss. 4(2)(b), the *Act* does not apply to material that is a matter of public record. Accordingly, the interviews and articles, websites etc. to which the Applicant refers would not be subject to the *Act*. Throughout the course of the Review process, the Applicant requested and received other information from Environment, which was released under the Routine Access Policy and does not form part of this Review.
4. Any and all correspondence provided to a public body by an applicant is generally speaking not provided with the responsive records as it is assumed that an applicant is in possession of this information. However, in this case, Environment included all correspondence received from the group the Applicant represents in the responsive Record sent to the Review Office. I find that identifying all of the records on file pertaining to the Review Request would have been beneficial, particularly in this case where the Applicant has concerns regarding whether the group's correspondence is in fact on file at Environment. This is where an Index of Records is useful as it makes reference to all information on the record and does not

necessitate providing copies of materials provided by an applicant.

5. Environment cited s. 14 [advice to the Minister] and s. 20 [personal information] in Decision #1 dated September 26, 2007. In addition to these exemptions, Environment, in Decision #2 after an audit was done in response to the Applicant's letter accompanying his/her Form 7,.claimed some of the Record was excluded from disclosure under ss. 4(2) as being related to a prosecution that was not completed, s. 15 [investigations] and s. 16 [solicitor-client privilege]. In its final Representations, Environment did not rely on s. 14, 20 or 16 and only made reference to s. 15 and ss. 4(2) of the *Act.* Because the Applicant only took issue with the s. 15 exemption at issue in this Review, representations from the Environment on the other provisions were unnecessary.
6. In the final stages of this Review, Environment withdrew its reliance on ss. 4(2)(i) of the *Act*, which excludes a record related to a prosecution from the purview of the *Act.* Despite ss. 4(2) being withdrawn, I find that at no time did it apply to this Record as there was no prosecution. Though it may have been cited by Environment in anticipation of the investigation potentially resulting in a prosecution, it did not apply to this Record. If any subsection of ss. 4(2) is applicable, the *Act* does not apply and the information is *excluded* as it does not fall under the access legislation. Having said that, as a best practice in order to avoid unnecessary delay, it is appropriate for a public body to claim both that the information is excluded and go on to cite exemptions. This enables the Review Officer to first find whether or not the information is excluded from the purview of the *Act*. If it is not, the Review Officer can go on to make a finding as to whether the exemptions under the *Act* apply. Public bodies should make the distinction clear to applicants. Public bodies need to give notice to applicants and third parties when reliance on an exception or exemption is withdrawn.
7. Subsection 4(2) of the *Act* renders certain information *excluded* from the purview of the legislation. In the case of subsection 4(2)(i), that means access legislation does not apply to "a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed." It is not an exemption whereby a public body may or may not choose to rely on it to withhold information such as under s. 15.

8. There was never any ***prosecution*** in this case at any time and, in particular, not at the time the Application for Access to a Record was made. There was an ***investigation*** being done based on a complaint under the *Environment Act* lodged by the Applicant at the time of the Application for Access to a Record. The Applicant was concerned that Environment could withdraw its reliance on s. 4 so close to the end of the Review. I agree with that concern. I find that in the June 24, 2008 decision, Environment advised the investigation was closed but made no reference to s. 4 in that letter. Merely not referring to it is not sufficient to let the Applicant know it is no longer being claimed in the course of the Review. That was the time for Environment to specifically withdraw the claim to the exception under s. 4 and thereby give notice to the Applicant.
9. Both of Environment's access decisions and its delay in responding to the Applicant and the Review Office were done prior to the Department of Environment and Labour becoming two separate departments. The delay by Environment and Labour, as it then was, was inordinate in both cases and not in accordance with the legislation. There has been an inordinate expenditure of time and resources in this matter. It should be remembered that transparency and openness as contemplated by the purposes of the statute is cost-effective.
10. When a complainant's right to information under the *Environment Act* intersects with an applicant's right to access information under the *FOIPOP Act,* Environment must take this factor into consideration in exercising its discretion under s. 15. The principal issue for the Applicant is whether or not a record can be withheld because it is part of an ongoing investigation. I find that, as here, where the Applicant is also the complainant under the *Environment Act,* the Applicant's right to access information pursuant to two statutes intersect. I find Environment must take into account the rights under the environmental complaint process when exercising discretion under the s. 15 exemption of the *FOIPOP Act,* with respect to an ongoing investigation.
11. In addition, I find nothing in the 104 pages of the Record referred to as the "Evidence" and "Investigation" file that would support a finding that harm would result to the investigation or investigative techniques if released to the Applicant. In support of this finding, I stress that no evidence was provided by Environment to demonstrate harm or a reasonable expectation of harm.

12. Once the investigation was complete, and no prosecution followed, Environment made a disclosure decision regarding the Record, which was released to the Applicant. The Applicant was informed of the right to Request a Review of this new decision by Environment. The Applicant chose not to Request a Review of Environment's last decision with respect to disclosure.
13. The Applicant was concerned about the manner in which s/he had been treated by Environment staff in relation to its investigation and his/her questions to Environment and about the fact that the delay may have caused harm to the environment. The *Act* does not require a public body to answer questions about the contents of the Record, though as in this case, it may choose to do so. Similarly, these are not matters within the jurisdiction of the Review Office; the manner in which the Applicant was treated and the subject matter of the Record. In this regard, the Applicant was informed of other available avenues, which s/he may wish to pursue, including a complaint to the Ombudsman.
14. Having said that, I find that one of the reasons that the statutory timelines for responding to an Application for Access to a Record is so the public body's response is of some utility to an applicant. The *Act* provides for extensions where more time is required by a public body. In this case, I find that Environment did not meet its duty to assist as it did not meet the timelines, did not provide an explanation for the delay and did not seek permission to be delayed in its response.
15. When filing the Application for Access to a Record, the Applicant requested a fee waiver. Environment waived all processing fees "[i]n light of the delay in getting these records to you, and in the spirit of the Act." In addition, Environment offered to extend the scope of the request for a period of approximately two additional months at no additional cost to the Applicant. Both of these determinations by Environment were appropriate and in keeping with the duty to assist.
16. The statute does not include specific instruction on how a public body is to inform an applicant that full pages have been withheld from the record provided. The requirement to be open, accurate and complete, however, would suggest that best practice would be to indicate the retracted page(s) and the exemption claimed on it and/or to provide an Index of Records that includes reference to the missing page(s). When the Form 7 was initially filed there was a concern that only one page of a briefing note

had been provided to the Applicant. Environment undertook a second search at the request of the Review Office and subsequently provided the second page of the Briefing Note to the Applicant. This issue was resolved prior to the matter coming to formal Review but it is an indication that the original Record provided to the Applicant was not complete.

17. Regarding the information with respect to the investigation conducted by Environment, while the Investigation was ongoing, the Applicant was provided with some of the evidence related to that Investigation but the portion of the Record was not identified as such. Once the Investigation was closed, the Applicant was provided with the remainder of the Record subject to applicable exemptions. The decision by Environment with respect to the Investigation file released to the Applicant is not at issue in this Review as the Applicant chose not to file a Form 7 with respect to this last decision by Environment.
18. I find that Environment has not demonstrated and the Record does not reveal that harm would result from the release of the portion of the Record related to the ongoing investigation. In addition, the Applicant had the right to information about the investigation under the *Environment Act* which tips the scales in his/her favour to have the discretionary exemption applied in his/her favour. I find that Environment did not exercise its discretion appropriately.
19. The Applicant was concerned about the "legalese" in the *Act.* This is a concern for many citizens and has been addressed by the Review Officer's issuing of the *Respecting Your Access and Privacy Rights: A Citizens' Guide for Nova Scotians* that is available in all public libraries, Access Nova Scotia centres and MLA constituency offices.

Recommendations: The Review Officer recommended the following to Environment:

1. Where an applicant is a complainant under the *Environment Act* and the Application for Access to a Record relates to that investigation, take this factor into account in exercising its discretion under s. 15 of the *Act* with respect to the Application for Access to a Record.
2. In future, provide an Index of Records to applicants with its decision letters, as a best practice in responding to Applications for Access to a Record.

3. Continue with its recently stated commitment to adhere to statutory timelines in processing future Applications for Access to a Record.
4. When a claim to an exception or exemption is withdrawn during the Review process, give notice to the applicant and, where appropriate, third parties, regardless of when in the Review process it is withdrawn.
5. When exercising discretion under s. 15(1)(a) and (c) of the *Act* to refuse access, provide evidence and information specifically to demonstrate the reasonable likelihood of harm resulting from the release of the information.
6. Provide information and direction to the relevant personnel within Environment of the necessity to coordinate efforts with the FOIPOP Administrator as to how to apply the *Act* in reference to s. 116 of the *Environment Act.*

Key Words: adequate search, Administrator, apology, complaint, deemed refusal, delay, discretion, double jeopardy, duty to assist, environment, evidence, exclusion, exemption, fee waiver, harm, Index of Records, intersecting access provisions, investigation, law enforcement, Ombudsman, "openly, accurately and completely", personal information, prosecution, reasons, Routine Access Policy, search, timeliness, special constables, withdrawal of claim.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s.2; ss.3(1)(e); ss.4(2)(i); ss.5(1); ss.5(2); s.7; ss.8(1); ss.9(1); s.14; s.15; s.16; s.20; ss. 34(3); ss. 38(2); ss.42(6); Environment Act; Alberta Freedom of Information and Protection of Privacy ss.1(h).*

Case Authorities Cited: *Barber v. The Information Commissioner (2005), EA/2005/0004, Information Tribunal, London, UK; ON Order MO-2334; BC Order 02-03; ON Order PO-2642; FI-06-69; FI-04-32; FI-05-08; On Order MO 2275; FI-06-79; FI-04-09(M); Canada (Information Commissioner) v. Canada (Prime Minister) (T.D.), [1993] 1 F.C. 427; FI-07-72; ON Order PO-2647; BC Order F05-24; BC Order 00-01; FI-07-12.*

Others Cited: *Office of the Saskatchewan Information and Privacy Commissioner, Helpful Tips; Respecting Your Access and Privacy Rights: A Citizens' Guide for Nova Scotians.*

REVIEW REPORT FI-07-58

BACKGROUND

The Applicant made numerous attempts to get information without the formalities of making an Application for Access to a Record or filing a complaint under the *Environment Act*. S/he was successful in obtaining some information under the Routine Access Policy. Ultimately the information s/he was trying to obtain was not forthcoming and the Applicant filed an Application for Access to a Record to get access to the information.

The Applicant received the responsive Record in three batches with severances: September 26, 2007, November 13, 2007 and June 24, 2008. The Applicant did not file a Form 7 Request for a Review with respect to the provision of the final decision on June 24, 2008. The Applicant's main focus appears to be on the process under the *Freedom of Information and Protection of Privacy Act* ["*Act*"] with respect to the timing and adequacy of the provision of the information by Environment. This poor response time, according to the Applicant, compromised his/her efforts on behalf of a local advocacy group to pursue its environmental concerns.

On July 17, 2007, the Applicant made an Application for Access to a Record to the Department of Environment and Labour, which is now called Nova Scotia Environment ["Environment"], which stated:

> *Any and all files, documents, reports, email and information concerning on-site sewage disposal applications, approvals, & investigations for [specified address], Nova Scotia including supporting surveys and definitions of ordinary mean high water mark.*

The Applicant submitted a Request to Waive Fees at the time of filing the Application for Access to a Record, which stated:

> *I represent a non-profit residents' group [Name and website address of Group represented by the Applicant] that has been successful in challenging a multi-million dollar engineering company's installation of a sewage drain at the water's edge in our cove. But with a new septic application currently under review, we have no budget for the legal and related costs that have been necessary.*

On August 27, 2007, because no Record had been received and no decision had been made, the Applicant filed a Request for a Review [Form 7] to the Review Office *[FI-07-51]* that stated as follows:

> *The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body;…No file provided within 30 days, and no written notification of any delay.*

The deemed refusal was the sole issue in this former Review. On September 5, 2007, the Review Office requested that Environment provide a copy of the Record within 15 days. The Review Officer wrote the Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator on September 26, 2007, as no Record had been received. On October 1, 2007, the Review Office confirmed that a Record had been received by the Applicant, thus this was no longer a deemed refusal. The Applicant was advised that the deemed refusal file would be closed but if s/he was dissatisfied with the Record received, the Applicant was advised to file a new Form 7, which s/he did resulting in this Review. While the deemed refusal file was resolved by the provision of a record, this background has been included because the issue of delay on the part of Environment spills over into the present Review. This is consistent with the new practice at the Review Officer to permit an applicant to carry forward the issue in a deemed refusal into another Request for Review as long as reference is made to it in the new or amended Form 7.

Accompanying the Record provided, in response to the Applicant's Application for Access to a Record, Environment made the following decision dated September 26, 2007, referred to herein as "Access Decision #1":

> *This request is further to records already provided to you through routine disclosure. Your request for access to the above identified records has been partially granted. As discussed, information falling under the following exemption provisions has been severed from the records in accordance with subsection 5(2) of the Act. The text which has been severed from the documents contains personal identifiable information which, if released, would be considered an unreasonable invasion of privacy (s.20) [ie: personal contact information and identity of private individuals], and information which would reveal advice to the Minister (s.14).*
>
> *s.14 Advice to [. . .] minister*
> *(1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations [. . .] developed by [. . .] a public body [. . . for . . .] a minister. [sic.]*
> *s.20 Personal information*
> *(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.*
>
> *In your application you requested a waiver of fees . . . In light of the delay in getting these records to you, and in the spirit of the Act, your request for a fee waiver is granted.*
>
> *Again, please accept my sincere personal and professional apologies for the delay in getting the records to you. As agreed, I will check with the Environmental Monitoring & Compliance Division to verify if the department was notified of the*

concrete slab being poured, whether an inspection was done pursuant tho [sic] this, and if an inspection report was done. Also, as agreed, once you have had a chance to review the enclosed records, you will contact me to advise whether you wish to request more current information. If such is the case, we will re-open this FOIPOP case file [on a one-time basis] without a further application fee being required.

Should you have any questions regarding this disclosure decision, please do not hesitate to contact me.

The Applicant filed a Request for a Review dated October 1, 2007 and received at the Review Office on October 4, 2007:

The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body; Documents missing from file released.

As noted in the attached letter, pages were omitted from a Briefing Note (point 3), and there is nothing in the file about [Third Party]'s investigation (point 4). We would like copies of the missing documentation on the four points noted in the attached letter.

And from the attached letter:

1. *There has been substantial attention to the group I represent, [Name of Group Represented by the Applicant], because of the investigations and violations that have occurred at [specified address]. For example, there have been many interviews and articles about our concerns and the lot in question…I have mentioned many of these in the dozens of letters of correspondence that my group has had with NSDEL officials over the past year. . . . This is obviously a major community concern. So where is all of the correspondence and site photos from my group? It is not in the file.*
2. *Given that your office [NSDEL] delayed responding to the FOIPOP request for over 60 days and ignored a deadline to respond from the NS FOIPOP Review Office, I would like to request the more recent documents that went into the file during this delay.*
3. *Pages were excluded without explanation from the file released. In particular, there is an undated Briefing Note with only page 1 included.*
4. *There is nothing in the file about [Third Party's] investigation there is not even mention of [Third Party's] name in the file and nothing at all on the investigation that [the Third Party] claims to be conducting. . . .*
   As you will see below, [Third Party] also notes that "I have your pictures (and). . . We have your multiple requests to cancel the approval. . ." So [the Third Party] acknowledges having these, but they are not in the file. . .
   My correspondence with [Third Party] also included a reference to the Dalhousie University study on septic effluent and the contaminated shellfish beds in the area . . . For some reason the file you are keeping has omitted all mention of this study.

On November 13, 2007, as a result of an audit being conducted in response to questions raised by the Applicant in the letter accompanying the Form 7, Environment made another decision, referred to herein as "Access Decision #2":

> *Your request for access to the above identified records has been partially granted. Information falling under the following exemption provisions has been severed from the records in accordance with subsection 5(2) of the Act. The text which has been severed from the documents contains personal identifiable information which, if released, would be considered an unreasonable invasion of privacy (s.20) [ie: personal contact information and identity of private individuals], information which would reveal advice for a public body or Minister (s.14), information pertaining to law enforcement (s.15), and information which is subject to solicitor-client privilege (s.16).*
>
> *s.14 Advice to public body or minister*
> *(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.*
> *s.15 Law Enforcement*
> *s.16 Solicitor-Client Privilege*
> *The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.*
> *s.20 Personal information*
> *(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.*
>
> *Please note that some records have been excluded from disclosure as they fall under s.4(2)(i) of the NS Freedom of Information and Protection of Privacy Act as they pertain to "records [sic.] relating to a prosecution if all proceedings in respect of the prosecution have not been completed."*
>
> *Please accept my apologies for the quality of some of the photocopies, and note that there are photocopies of photos contained in the records. I would like to reiterate my apologies for the fact that some of the records were not reviewed for my first disclosure response to you. This was a result of staff changes and has now been rectified. Please note also that this issue is still under active investigation.*

On April 1, 2008 the Department of Environment and Labour officially was separated into two distinct departments. A new FOIPOP Administrator was assigned to this file.

On June 15, 2008 the Applicant provided additional information by indicating that the following items were not included in that file:

a. *[Name of Employee of Environment] has made a number of false and misleading media statements as the spokesperson for NS Environment, and none of the background notes for those or the media coverage and editorials about the department's handling of this pollution was included in the file that was released (point 1 in my Sept. 29 07 email, attached to Form 7).*
b. *There have now been three septic applications for this property, although I am still trying to get copies of the third of these. . . The Septic Application is not even subject to FOIPOP application, and the entire document is a public record, as I understand it.*
c. *The Environment staff gave a Variance as part of the most recent Septic Approval. . . The public should know what really went on, by having access to these documents. There has been no point filing a new FOIPOP application, when the original one is still being ignored.*
d. *There has been probably hundreds of communications between [The Group Represented by the Applicant] (for which I am a spokesperson) and NS Environment. However, nearly none of these were in the file provided. . .*
e. *Briefing Note from December 2006: only page 1 was included.*
f. *All documents from the secret investigation that [Third Party] claims to have conducted.*
g. *As you note, the Dalhousie University study was not in the file.*

On June 24, 2008, Environment made the following decision, which was a new decision and the third access decision in response to the original Form 1. This final decision was a result of the fact that the investigation at Environment had been closed. This final decision is not the subject of this or any other Request for a Review. The disclosure, including any exemptions relied on by Environment do not form part of this Review because the Applicant chose not to file a Form 7 with respect to that decision. To ensure the Review Report is comprehensive and addresses all of the relevant information, however, the final decision by Environment is included and reads as follows:

> *"As per your request for review, this office was contacted by the FOIPOP Review Office with respect to a missing page of an undated briefing note, and asked to conduct a new search for the missing page(s). I was able to locate the missing page and have reviewed the document for disclosure.*
>
> *Your request for access to the information has been partially granted. Information falling under the following exemption provision has been severed from the records in accordance with subsection 5(2) of the Act. The text which has been severed from the documents contains information which would reveal advice for a public body or minister (s.14).*
>
> *s.14 Advice to public body or minister*

(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.

Further to your request for review, specifically with reference to [Third Party] investigation/evidence file, in an email to the Review Office on November 13, 2007, the FOIPOP Administrator indicated that we would be willing to consider releasing records once the investigation had been closed. As this investigation is now closed I have reviewed all the records contained in the investigation/evidence file for possible disclosure. The disclosure decision is contained below.

Your request for information has been partially granted. Information falling under the following exemption provision has been severed from the records in accordance with subsection 5(2) of the Act. The text which has been severed from the documents contains personal identifiable information which, if released, would be considered an unreasonable invasion of privacy (s.20), information which would reveal advice for a public body or minister (s.14), information pertaining to law enforcement (s.15), and information which is subject to solicitor-client privilege (s.16).

s.14 Advice to public body or minister

(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.

s.15 Law Enforcement

s.16 Solicitor-Client Privilege

The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

s.20 Personal information

(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."

By letter dated September 26, 2008 and received October 6, 2008, the Applicant filed an Amended Form 7 refining the Request for Review. The contents of the Amended Form 7 and discussions as part of the Review Office's Investigation process focused the matters at issue in this Review. Specifically, the following are the relevant issues that will form part of this Review:

1. Search.

a. *"notes and documentation provided to or used by [Name of Employee of Environment] in making public statements about the approval process at that time." This is not referring to the actual media release, but the working documents. Are*

these documents considered responsive? Was an adequate search conducted regarding these documents?

b. *Emails. The Applicant believes that only printed emails were included, not ones found on the system (that had not been previously printed and filed). Was an adequate search conducted regarding these documents?*
c. *Were all responsive records provided to the FOIPOP Administrator, by [Names of Two Employees of Environment], when requested to do so?*

2. Duty to Assist.

a. Was the Applicant provided sufficient details on the applicability of exemptions claimed?
b. Were sufficient details provided regarding which records the exemptions applied to?
c. Where pages were withheld in full, was the Applicant provided with sufficient details indicating the number of pages that were being withheld?
d. Should severing have been employed on pages that were withheld in full?
e. Was the time taken to process the access request reasonable and in accordance with the Act?
f. Did the time taken to process the access request cause harm to the public?
g. During the course of the Review, when additional records were released to the Applicant, was sufficient explanation given to the Applicant so that s/he knew why s/he was receiving the records?

3. Withholding information.

Related to the "[Third Party]" file only.

a. Was the information relating to the investigation, withheld in accordance with the Act?
b. After the investigation was complete, was the "investigation file" subsequently released in a reasonable timeframe?

On January 12, 2009, Environment advised the Review Office that it was withdrawing its reliance on s. 4 of the *Act* [no subsection cited] with respect to 104 pages of the Record. Environment did not give notice to the Applicant of its decision to do so. The Applicant became aware of the withdrawal as a result of it being included in the Investigation Summary, which was provided to the parties on January 13, 2009. The Applicant made representations in this regard, which are detailed below under the Applicant's Submission.

On January 13, 2009, the Mediator determined that Mediation would not satisfy the parties.

RECORD AT ISSUE

The Record requested has now been released to the Applicant and is not the subject of this Review. But the issue of whether Environment properly exercised its discretion under the exemption in ss. 15(1)(a) and (c) of the *Act* with respect to withholding information during an active investigation remains at issue in this Review. The portion of the Record at issue concerns documents that were withheld in full because they were part of an investigation being done by Environment or its agent. The

documents at issue, referred to as the Record, were also found in a file referred to as both the "Evidence" and "Investigation" file.

APPLICANT'S SUBMISSIONS

The Applicant made numerous submissions over the course of the investigation process, throughout which the Applicant's focus was s. 15 of the *Act,* concerned about not being able to access the full Record during the investigation. The Applicant did not take issue with Environment's initial reliance on the s. 4 exception. The following is a summary of the Applicant's representations since the investigation was completed and the matter was referred to formal Review.

January 15, 2009

1. The Applicant made note of two matters in the Investigation Summary that were two key issues for him/her. First, that there were 104 sequential pages withheld in full by Environment and second the timeline "makes note of at least one deadline that the government ignored, with no response at all until 71 days after Form 1 was submitted."
2. The Applicant raises the issue of whether the Review Officer will note the most basic of requirements in the process, that is, there must be a response, or a request for an extension, within 30 days of the Form 1 being submitted to the public body.
3. The Applicant submits that s/he had no notice that the exemptions claimed by Environment in 2007 were changed in 2009. S/he is concerned that Environment withdrew its claim under ss. 4(2) on January 12, 2009 after the Review Office's investigation was completed. The Applicant queries whether or not by withdrawing its reliance on ss. 4(2), Environment is now saying there was no investigation done even though the Record was withheld in part on this basis.

February 2, 2009

4. The Applicant submitted that s/he was not aware that a Form 7 needed to be amended in order to raise the issue of whether the public body had followed the legally sanctioned timelines.
5. The Applicant submits that s/he is entitled under the legislation to receive full documents from the public body and exemptions for any parts that are redacted. To withdraw reliance on an exception so late in the game, long after the documents have already been withheld and released is clearly not fair.
6. The Applicant impugned the motives behind how Environment has responded to the Application for Access to a Record and proposes that provincial employees be sanctioned in their personnel evaluations if they purposively violated the FOIPOP legislation. The Applicant recognizes that the Review Office cannot sanction employees but proposes a recommendation to include this in their personnel evaluation.

February 4, 2009

7. The Applicant reinforces his/her objections with respect to whether the Investigation Summary should have discussed the failure by Environment to ignore the 30 days response time under the *Act,* its failure to ask for an extension and its failure to respond until a Request for a Review had been filed [deemed refusal] and 71 days had passed. The point is that objectivity does not equal "favoring each side equally" as once the public body fails to follow the law, to ignore that is to allow them to be exempt from the law.
8. The Applicant submits that s/he in fact raised this issue in the Amended Form 7, which states:

   "2. Delays" that "NS Environment did not respond to the initial FOIPOP request within 30 days (or even 60) as legally required"

9. The Applicant had inquired whether or not Representations are exchanged between parties. S/he withdrew the request to seek permission from Environment to do the exchange as the Applicant did not want to add additional time and complication to the process.

PUBLIC BODY'S SUBMISSION

Environment provided its formal Representation to the Review Officer on February 13, 2009, which provided as follows:

1. Environment begins its Representation by highlighting the key dates and events since the Form 1 dated July 20, 2007 was received, details of which are contained elsewhere within this Review Report and do not need to be repeated here. The Representation includes reference to the information released under Routine Disclosure and the closed deemed refusal file. *[FI-07-51]*

2. The Submission goes on to respond to each of the points in the Investigation Summary raised by the Amended Form 7. The highlights are as follows:

1. Search

a) Re Notes and documentation used by an employee in public statements: Environment submits that any such records would not be considered responsive to this application as the employee's involvement came after the date of the Form 1 and therefore is outside of the time frame. An offer is extended for the Applicant to submit a new Form 1.
b) Re Emails: Environment submits that once it came to light that there were records missing from the first response, an audit was conducted and additional records were located and a second response sent to the Applicant. Environment believes that all the records relevant to this request were reviewed for disclosure and provided to the Applicant in the second response.

c) Re Responsive Record: Environment states that when the file audit was conducted emails were sent to all relevant personnel and an email from the Records Clerk attests to the extent of the search.

2. Duty to Assist

a) Re Sufficient details as to the applicability of the exemptions: Environment claims that it is standard practice in responding to a request for information to provide an explanation with respect to the information that had been severed, which was done for all three responses to the Applicant in this case.
b) Re Sufficient details regarding which records the exemptions applied to: Environment states that its standard practice is to identify at the top of the page the exemption(s) being cited if any information is severed and details regarding the exemption are contained in the response letter [decision].

> *That being said, in many cases any reference to a s. 15(Law Enforcement) exemption did not contain a detailed description, it merely referenced "Law Enforcement". This is a practice that has been changed and more information is provided with regards to this specific exemption.*

c) Re Sufficient detail where pages were withheld in full: Environment recognizes that its past practice of not providing blank pages with exemptions or the number of pages severed in full had caused some confusion particularly where an applicant expected some information to be on the record and it had been severed in full.

> *This is a practice that has changed since April 1, 2008. The practice now is to note in the records with a blank page or a header that X amount of pages have been severed in full under the specific exemption.*

Environment submits that while not in the initial two responses to the Applicant, Environment did reference any portion of the Record that had been withheld in full and the number of applicable pages for the final release on June 24, 2008.
d) Re Whether severing should have been employed on pages withheld in full: Environment submits that:

> *. . .where these records were specifically being used in an active investigation at the time of the two responses, severing was not an option. Once the investigation was complete the documents contained within it were considered for possible disclosure and a third response was sent to the Applicant which contained some documents with severing along with some records which were severed in full.*

e) Re Was the time taken to process the Application for Access to a Record reasonable and in accordance with the *Act*: There was no documentation on the file to offer an explanation as to why the statutory timelines had not been met. The then FOIPOP Administrator advised she had told the Applicant of the need to

extend by telephone but this extension was not documented on the file and not the subject of a formal extension letter to the Applicant. Further, Environment submits:

> *Since this time, NS Environment has taken steps to ensure that this type of situation is not repeated and strict adherence to the legislated time frames are enforced and recorded in the case file.*

f) Re Did the time taken to process cause harm to the public: Because the regulatory scheme for issuing approvals for on-site septic and how those approvals get issued and whether those decisions can be challenged are outside the FOIPOP process, Environment submits it cannot comment on whether there was harm caused to the public.

With regard to the withdrawal of the ss. 4(2)(1)(i) claim, Environment stated as follows:

> *At the time the department was still conducting an investigation with respect to the activity at the property. It was not clear what the outcome would be in terms of whether or not charges would be laid and against whom. This office was recently contact [sic] with respect to this matter, and since the investigation had since concluded there was a decision to withdraw the claim of s.4(2)(i). Had this claim not have been made, it would have had no affect [sic] on the outcome of the construction of a dwelling and installation of a septic system.*

g) Re Sufficient explanation to the Applicant when additional records released: Environment submits the explanation provided to the Applicant with the second and third disclosure was sufficient. The explanation for the second disclosure included an apology to the Applicant for:

> *. . . the fact that some of the records were not reviewed for my first disclosure response to you. This was a result of staff changes and has now been rectified. Please note that this issue is still under active investigation.*
>
> With respect to the third release of records, the Applicant was advised in a letter dated June 24, 2008, that:
>
> *Further to your request for review, specifically with reference to [Third Party's] investigation file, in an email to the Review Office on November 13, 2007, the FOIPOP Administrator indicated that we would be willing to consider releasing records once the investigation had been closed. As this investigation is now closed I have reviewed all the records contained in the investigation/evidence file for possible disclosure.*

3. Withholding Information

a) Re Withholding information related to the investigation file withheld in accordance with the *Act*:

> *Information relating to the then on-going investigation, were withheld in keeping with the provisions of the Freedom of Information and Protection of Privacy Act, specifically s. 14, 15, 16, & 20. No records were "illegally withheld" from disclosure. As the investigation was on-going at the time, releasing any of these documents would have compromised the investigation and revealed the manner in which the investigation was being conducted.*
>
> *Specifically, with respect to the s. 15 exemption, NS Environment was completely within its right to withhold information pertaining to an on-going investigation. NS Environment is an enforcing department, and our inspectors have status as "Special Constables" under the Police Act. Information collected through the course of an investigation, which is not yet complete would fall under section 15(1)(c) - harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement.*

b) Re was the "investigation file" released within a reasonable timeframe after the investigation was complete, Environment submits that the investigation was closed on June 18, 2008 and the final response including records were sent to the Applicant on June 24, 2008.

Environment, in responding to the Applicant's allegation that records were withheld "illegally" and that personnel should be held accountable, submits that at all times Environment withheld documents in whole or in part in accordance with the *Act.*

DISCUSSION:

The issues in this Review, as identified in the original Request for a Review [Form 7] and the Amended Form 7, are as follows:

1. Did Environment conduct an adequate search for the responsive Record?

2. Was the information included in the disclosure decisions open, accurate and complete in accordance with the duty to assist?

3. Does s. 15 of the *Act* allow Environment to withhold records relating to an ongoing investigation? The Record requested has now been released to the Applicant and is not the subject of this Review. But the issue of whether Environment properly exercised its discretion under the exemptions in ss. 15(1)(a) and (c) of the *Act* with respect to withholding information during an active investigation remains at issue in this Review.

> The portion of the Record at issue concerns documents that were withheld in full because they were part of an investigation being done by Environment. The documents at issue, referred to as the Record, were also found in a file referred to as both the "Evidence" and "Investigation" file.

A number of additional issues arose during the processing of this Review not specifically mentioned on either of the Form 7s, which can be summarized as follows:

1. If a specific matter regarding the process [deemed refusal] is not raised specifically in the original Form 7 or the Amended Form 7, is it appropriate for the issue to be considered by the Review Officer at formal Review?

2. Should Environment be permitted to remove or retract an exemption [in this case it was an exclusion but was treated like an exemption] during the Review process? Is it the role of the Review Office to allow this?

3. If yes, does the *Act* or administrative fairness require the public body to send notification to an applicant?

To begin, I will dispose of these additional issues.

Deemed Refusal

I am satisfied that at least two of the points raised by the Applicant in the Amended Form 7, summarized below, raise the issue of timeliness in decision making. That enables the Review Officer to consider as part of this Review whether the delay in making the initial decision was done in accordance with the *Act* [deemed refusal]:

> *Was the time taken to process the Application for Access to a Record reasonable and in accordance with the Act?*
>
> *Did the time taken to process the Application for Access to a Record cause harm to the public?*

Regardless of whether the Amended Form 7 raises the issue of delay, I conclude that the Review Officer should consider whether or not a public body has complied with the duty to assist under the *Act* whether or not it has been specifically included on a Form 7.

An independent oversight body has the responsibility to identify issues with respect to the access to information process including, but not restricted to, the duty to assist that have been referenced by or that have not been raised by the Applicant in the Form 7s. In this case the Applicant complains about the process generally and about the quality and quantity of the reasoning provided in the decisions and the timing of providing the information specifically. Neither the Form 7 nor the amended Form 7 refer specifically to the deemed refusal that was the subject in another Review file. The initial Request for Review related to a deemed refusal was subsequently resolved when a

decision was forthcoming from Environment, but the Applicant still wanted to contest the lateness of the response from Environment. In fact, from my reading of the Submissions from the Applicant and the overall tone of the Review file as a whole, delay is the principal concern that relates to both the delay in making a decision(s) and the delay in providing a copy of the Record.

> *We have not had to make a finding in relation to s. 16 in this appeal. However, we would observe that a complainant in person should not be expected to be familiar with all the provisions of Part I of FOIA and that just because a complainant does not specify a breach of the duty to provide advice and assistance in his complaint, that should not mean that the Commissioner is under no further obligation to consider the public authority's duty in this respect. We come to this conclusion because we consider that where an authority has not complied with its duty under s. 16 this may go to the very nature of the request and that any exercise of discretion by the Commissioner which does not take this into account may be flawed. Moreover the Commissioner has a general duty to promote the following of good practice by public authorities under s. 47(1) FOIA so as to promote the observance of the requirements of the Act.*
> *[Barber v. The Information Commissioner (2005), EA/2005/0004 Information Tribunal, London, UK)*

Environment's Withdrawal of Claim under s. 4 of the *Act*

This leads to the next issue of Environment's reliance on and subsequent withdrawal of a claim under s. 4 of the *Act.* The reliance on ss. 4(2)(i) of the *Act* did not occur until Decision #2 on November 13, 2007. That section states:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records.*
>
> *(2) Notwithstanding subsection (1), this Act does not apply to . . .*
>
> > *(i) a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed;*

Environment did not make it clear to the Applicant that it was claiming that the information being withheld was the subject of an ongoing prosecution and therefore the *Act* did not apply. Environment simply said based on that provision "some records have been excluded from disclosure." Its significance as a claim of exclusion to which the access legislation did not apply was not fully explained to the Applicant. The Applicant did not become aware of the withdrawal until s/he received the Investigation Summary from the Review Office in mid-January of this year.

Despite ss. 4(2) being withdrawn, I find that at no time did it apply to this Record as there was no prosecution. Though it may have been cited by Environment in anticipation of the investigation potentially resulting in a prosecution, it did not apply to this Record. Ultimately, this resulted in it being withdrawn by the new FOIPOP

Administrator. Public bodies can withdraw their reliance on exceptions or exemptions at any time but should give notice to the applicant, any other parties and the Review Office of that decision. The Applicant, who may have relied heavily on arguments about the particular withdrawn exemption or exception in his/her Representations, should be given the opportunity to refocus his/her submissions. It is within the discretion of the Review Officer to permit a public body to withdraw an exception or exemption at any time. Fairness, however, requires that the public body give notice to an applicant and that did not happen in this case. I find that s. 4 of the *Act* did not apply and Environment failed to give the Applicant notice of its withdrawal of that exception.

Major Issues in the Review

I turn now to the three main issues in this Review.

The purpose section of the *Act* provides:

2 The purpose of this Act is

(a) to ensure that public bodies are fully accountable to the public by

> ***(i) giving the public a right of access to records,***
> *(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,*
> ***(iii) specifying limited exceptions to the rights of access,***
> *(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*
> *(v) providing for an independent review of decisions made pursuant to this Act; and*

(b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to

> *(i) facilitate informed public participation in policy formulation,*
> ***(ii) ensure fairness in government decision-making,***
> ***(iii) permit the airing and reconciliation of divergent views;***

(c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information.
[Emphasis added]

The Applicant has a right of access under the *Act* subject to specific, limited exemptions:

5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.

(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.

In responding to an Application for Access to a Record, every public body is under a duty to assist pursuant to s. 7 of the *Act,* which provides as follows:

7(1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall

(a) ***make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;*** *and*
(b) either

(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or
(ii) transfer the request to another public body in accordance with Section 10.

[Emphasis added]

Adequate Search for the Responsive Record

When an applicant identifies search as an issue during the investigation, the staff at the Review Office ask several questions to help the Review Officer determine whether or not an adequate search was conducted. The Review Officer must be satisfied that the public body made every reasonable effort to locate an accurate and complete responsive record, thereby fulfilling its duty to assist. The standard search questions used by the Review Office, borrowed from the Saskatchewan Commissioner's Helpful Tips Guide, include:

- *Were records in any form or format considered (i.e. electronic, paper, and other)?*
- *Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?*
- *How did you search for the records in the public body's possession?*
    - *Did you search yourself?*
    - *Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?*
    - *Did you send out an email to other units, etc?*
- *Could records also exist that are responsive to this access request that are not in your possession, but in your control?*

- *Did agents, consultants or other contracted services have any role in the project the access request is referencing?*
- *If yes, are these records included in the package provided to the [Review Office]?*

The test of what constitutes a reasonable search has been uniformly applied in access decisions. The rationale from the Ontario and British Columbia Commissioners assist in this discussion and read as follows:

> *The Act does not require the City to prove with absolute certainty that further records do not exist. However, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. A reasonable search is one in which an experienced employee expends a reasonable effort to locate records which are reasonably related to the request [other Orders listed]. Furthermore, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.*
> *[ON Order MO-2334]*

> *. . .in searching for records, a public body must do that which a fair and rational person would expect to be done or consider acceptable. The search must be thorough and comprehensive. The evidence should describe all potential sources of records, identify those searched and identify any sources that were not searched, with reasons for not doing so…*
> *[BC Order 02-03]*

The Applicant identified search in the Amended Form 7. The key is whether Environment can demonstrate with evidence that the person responsible for the search made a reasonable effort to identify the responsive Record:

> *The Act does not require the University to prove with absolute certainty that further records do not exist. However, the University must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624]. Previous orders have established that a reasonable search is one in which an experienced employee, expending a reasonable effort, conducts a search to identify any records that are reasonable [sic] related to the request [Order M-909].*
>
> *As set out above, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that additional records might exist.*
> *[ON Order PO-2642]*

In this case, the Applicant claims some of the Record was missing as some of the information provided by the group s/he represents is not in the copy of the Record provided. Generally speaking, information provided to a public body by an applicant is assumed to already be in his/her possession and will not be included in the responsive

record. This would include letters and emails from the Applicant. This would also include the email sent by the Applicant to Environment about the study at Dalhousie University, which was the only mention of that study in the Record.

> *In these types of situations, the Review Office assumes that individuals maintain their own copies of correspondence sent to or received from a public body. [FI-06-69]*
>
> *I have concluded that the Act, does not require public bodies to return copies of correspondence to those who initiated them. [FI-04-32]*

The Applicant was informed of this in the August 15, 2008 letter. That being said, an Index of Records, including the Applicant's correspondence, given at the time of the first decision would have resolved this confusion for the Applicant as the existence of those documents as part of the Record would have become known. It is important to remember that not everyone is able to retain paper or electronic copies of information sent to a public body. Equally important, as in this case, the Applicant wants to know that the information sent was received and retained. To summarize, ways to ensure an applicant is aware that the responsive record is complete, can be achieved in a number of ways including:

- *Provide an Index of Records at the outset;*
- *Make reference to the portion of the record that was received from the Applicant in the decision letter;*
- *Provide a Summary confirming what is in the record that is not being provided because it was received from the Applicant;*
- *Offer to the Applicant to come and view this portion of the record on site;*
- *Provide copies of the documents at the expense of the Applicant.*

Environment took an inordinate amount of time to respond to the Application for Access to a Record. The decision that accompanied the initial release of information [Decision #1] did not satisfy the Applicant. Environment undertook what it referred to as an "audit", which resulted in Decision #2 and the release of more of the responsive Record. Ultimately a final decision was made by Environment in June 2008, which the Applicant did not take issue with as no Form 7 was received seeking a Review of that decision. This final portion of the Record was claimed to be relevant to an ongoing investigation, which was released when the investigation was complete.

Both decisions fell short of being of assistance to the Applicant. No indication was given to the Applicant that there was an ongoing investigation or what information had not been included with the release. The copy of the Record given to the Applicant did not have blank pages containing the exemptions or exclusions being relied upon. The decision letters fell short of providing the Applicant with sufficient detail of the reasons behind Environment's exercise of discretion to withhold the information and the exemptions claimed. When Decision #2 was made including reference to the investigation portion of the file, Environment did not inform the Applicant of the

subsections claimed for section 15. It is open to public bodies to respond to applicants in their own unique way but they must meet some basic standards under the duty to assist and give an adequate explanation to applicants. Ultimately the Review Office prepared, as a courtesy, an Index of Records. As a matter of best practice, an Index of Records achieves a number of goals.

I take the position that part of a public body's duty to assist and as a best practice an Index of Records will be provided to an applicant. Where the Review Office has prepared the Index, because the Index may constitute a disclosure of some of the contents of the record, it will not be the usual practice of the Review Office to share its Index with the parties. An Index is encouraged as a proactive measure that often expedites the Review process or resolves the matter. Frequently, applicants request Reviews only because they wish to confirm the existence of a record and are satisfied once they receive an Index from the public body. This may be because a document was withheld in full and therefore the applicant did not know it had been identified as responsive and as a result thought an adequate search was not completed.

In Nova Scotia and other jurisdictions, applicants' requests are resolved when they are provided with an Index of Records that details the exemptions that the public body has applied to a specific record.

> *This Office also prepared an index of records and recommended that the Applicant be provided with this index. The LTD Plan agreed to do this. The Applicant, having received the index, appeared to be satisfied with the severances. . .*
> *[FI-05-08]*

The Index also serves as a useful reference tool for all parties. For example, when referring to specific documents, everyone is using the same language. Lengthy Review processes often could have been avoided if an Index of Records had been provided to an applicant at the earliest date, preferably along with the first decision letter or early in the Review process.

> *I order the City to prepare an Index of Records to accompany the decision letter sent to the appellant pursuant to Provision 1, above. Specifically, the Index of Records should clearly describe each record, state whether access to each record or portion of a record is granted or denied, and for each record or portion of a record to which access is denied, identify the exemption (including the applicable subsection(s) where an exemption has more than one subsection) that is claimed for that record or portion of a record.*
> *[ON Order MO-2275]*

Regarding the remainder of the responsive Record, on a review of the Form 1, it is clear that the Applicant made reference to "investigations." The entire portion of the Record related to the investigation was not included in Decision #1. In fact that decision makes no reference to the exemption under s. 15 [investigations] and the copy of the Record did not include these pages. In Decision #2 there was a brief mention of the

investigation by stating the exemption applied to the text severed. Decision #1 did not indicate that entire pages had been withheld in full, let alone the number of pages [104 pages]. It was not until the Applicant received an Index of Records from the Review Office that s/he became aware of the number of pages and documents that were withheld in full. The decision letter also did not identify that an active investigation was ongoing. This is despite the fact that the Applicant notes the absence of information about an investigation, which s/he knows to be ongoing as s/he is the person that launched a complaint under the *Environment Act.*

The process followed by Environment leading up to Decisions #1 and #2 failed to meet the standard for an adequate search.

Timeliness of Decisions and Providing the Responsive Record

As part of the duty to assist, public bodies are required to "respond without delay" when an Application for Access to a Record is received. If unable to do so, public bodies are able to take extensions of the timelines under the statute or to seek permission for lengthier delays.

> *9(1) The head of a public body may extend the time provided for in Sections 7 and 23 for responding to a request for up to thirty days or, with the Review Officer's permission, for a longer period if*
>
> > *(a) the applicant does not give enough detail to enable the public body to identify a requested record;*
> > *(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operations of the public body; or*
> > *(c) more time is needed to consult with a third party or other public body before the head of the public body can decide whether or not to give the applicant access to a requested record.*

In addition to the statute guiding how to deal with delay, s. 8 of the *Act* imposes a duty on public bodies, which provides:

> *8 (1) Where an applicant is informed pursuant to subsection (2) of Section 7 that access will be given, the head of the public body* ***shall***
>
> > *(a) where the applicant has asked for a copy pursuant to subsection (2) of Section 6 and the record can reasonably be reproduced,*
> >
> > *(i) provide a copy of the record, or part of the record, with the response, or*
> > *(ii)* ***give the applicant reasons for delay in providing the record****; or*
>
> ***[Emphasis added]***

In addition to the delay in responding to the Applicant in the timeframes set out in the *Act*, Environment took nearly two months to provide the Review Office with a complete copy of the responsive Record. The timing of this aspect of this Review is as follows:

a. Section 7(2) of the *Act* requires a public body to respond to an Application for Access to a Record within 30 days. In this case, the first access decision was issued 71 days after the Form 1 was submitted. The second access decision was 119 days after the Form 1 was submitted.
b. Section 9 of the *Act* permits a public body to take an additional thirty days to respond without the Review Officer's permission but which can be the subject of a Request for Review by an applicant. Environment at no time advised the Applicant of its intention to take the additional 30 days.
c. Section 9 of the *Act* also makes provision for a public body to make a request to the Review Officer for additional time for specific reasons. At no time did Environment seek an extension of time from the Review Officer.
d. The *Act* compels the Review Officer to give a copy of a Request for Review to the public body *forthwith.* In accordance with ss. 34(3)(a) of the *Act*, the Review Office received the original Form 7 on October 4, 2007 and on the same date provided a copy to Environment requesting a response to a number of questions with respect to the Record. A copy of the Record that was given to the Applicant had already been provided to the Review Office in response to the Request for Review of the Deemed Refusal *[FI-07-51]*.
e. The *Regulations* under the *Act* require public bodies to comply with a requirement imposed by the Review Officer within 15 days under ss. 38(2) of the *Act.* Environment went on to make a second decision dated November 13, 2007, received November 14, 2007, with respect to the Record. The Review Office asked for a copy of the newly released Record on November 16, 2007. The Record was to be provided within the required 15 days in accordance with the *Regulations.* Ultimately Environment did not provide a complete copy of the responsive Record to the Review Office until nearly two months later on January 24, 2008 when two binders of the unabridged Record were delivered.

In this case, the provision of the Record or portions thereof and the accompanying decisions from Environment were delayed, spaced over time and incomplete. While I believe Environment made some effort to be in communication with the Applicant regarding the request, this may have only served to distract from the procedures and timelines set by statute. Timelines were missed in making a decision and providing access, the Review Officer was not asked for an extension for time and Environment had to make a second decision upon further inquiries from the Applicant in the course of the Review process. Ordinarily this would be prudent but in this case on reading the Form 1, it is clear that the Applicant made reference to "investigations" as discussed above.

The Applicant argued that the delay caused harm to the public. In this case, where the Applicant had filed a complaint to Environment regarding an environmental issue and Environment knew time was of the essence, it is possible that the delay in responding to the Application for Access to a Record or reporting to the Applicant as the

complainant under the *Environment Act* may have precluded the Applicant from persuading Environment to proceed one way or another. I find on a balance of probabilities that if there had not been such an inordinate delay in responding to the Applicant, s/he may have been able to advocate more effectively with respect to potential harm to the environment.

The timeframe followed by Environment leading up to Decisions #1 and #2 failed to meet the statutory requirements.

Does s. 15 allow Environment to withhold a Record regarding an Active Investigation?

There is one type of exemption that is under Review regarding this Record: s. 15 of the *Act,* which is a discretionary exemption. Section 15 provides as follows:

> *15 (1)The head of a public body 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;*

Once it has been determined by a public body that a discretionary exemption is applicable to the information, it must then go through the exercise of discretion to apply the exemption. In other words, even though the discretionary exemption may be applicable, a public body can choose not to apply it to the information. The Review Officer, unlike the Nova Scotia Supreme Court where an applicant or third party appeals a decision of a public body directly, has the ability to recommend the discretionary exemption *not* be applied by a public body to permit access to a record. This is substantively different from the power given to the Court in similar circumstances. Subsection *42(6)* provides as follows:

> *Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record.*

There is no equivalent restriction placed on the Review Officer. This means that the Review Officer can recommend that a public body exercise its discretion differently.

When exercising its discretion to apply the exemption or not, a public body must consider all relevant factors. A recent Review Report from this Office provides great detail about the exercise of discretion. In that I stated:

> *In determining how to exercise its discretion, reference to a recent Review issued by this Review Office, FI-06-77, with respect to the exercise of discretion bears repeating:*

Any public body in exercising its discretion under one of the statutory exemptions listed in the statute beginning at s. 12 should be mindful of the following factors:

1. *The purposes of the Act including that* ***individuals have a right to access their own personal information;***
2. *Exemptions from the right to access* ***should be limited and specific*** *in order to*
3. *Honour the broad purposes of the Act; and*
4. *Privacy of individuals should be protected.*

[Emphasis added]

BC Information and Privacy Commissioner's Order No. 325-1999 outlined a non-exhaustive list of factors for a public body to consider:

In inquiries that involve discretionary exceptions, public bodies must be prepared to demonstrate that they have exercised their discretion. That is, they must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception….

In exercising discretion, the head considers all relevant factors affecting the particular case, including

> *• the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
> *• the wording of the discretionary exception and the interests which the section attempts to balance;*
> *• whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*
> *• the historical practice of the public body with respect to the release of similar types of documents;*
> *• the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
> *• whether the disclosure of the information will increase public confidence in the operation of the public body;*
> *• the age of the record;*
> *• whether there is a sympathetic or compelling need to release materials;*
> *• whether previous orders of the Commissioner [or Review Officer] have ruled that similar types of records or information should or should not be subject to disclosure; and*

> • *when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been* made.
>
> *[FI-06-79]*

Environment exercised its discretion to withhold part of the responsive Record based on s. 15. Environment argues that release of this portion of the Record could harm law enforcement or harm the effectiveness of investigative techniques. Law enforcement is defined in s. 3 of the *Act* as follows:

> *3(1)(e) "law enforcement" means*
>
> > *(i) policing, including criminal-intelligence operations,*
> > *(ii) investigations that lead or could lead to a penalty or sanction being imposed, and*
> > *(iii) proceedings that lead or could lead to a penalty or sanction being imposed;*

The equivalent legislation in Alberta provides a more detailed definition for "law enforcement", which reads as follows:

> *1 In this Act,*
>
> > *(h) "law enforcement" means*
> >
> > > *(i) policing, including criminal intelligence operations,*
> > > *(ii) a police, security* ***or administrative investigation, including the complaint giving rise to the investigation, that leads or could lead to a penalty or sanction****, including a penalty or sanction imposed by the body conducting the investigation or by another body to which the results of the investigation are referred, or*
> > > *(iii) proceedings that lead or could lead to a penalty or sanction, including a penalty or sanction imposed by the body conducting the proceedings or by another body to which the results of the proceedings are referred."*
> > > ***[Emphasis added]***

Part of the responsive Record withheld related to information that was part of an investigation under the *Environment Act,* the relevant section of which reads in part as follows:

> *115 (1) Any person who is of the opinion that an offence has been committed under this Act may apply to the Department to have an investigation of the alleged offence conducted.*

Once the complaint is investigated, the *Environment Act* establishes offences under s. 158 and penalties under s. 159.

158 A person who

(a) knowingly provides false or misleading information pursuant to a requirement under this Act to provide information;
(b) provides false or misleading information pursuant to a requirement under this Act to provide information;
(c) does not provide information as required pursuant to this Act;
(d) hinders or obstructs an inspector or administrator who is exercising powers or carrying out duties, or attempting to do so, pursuant to this Act;
(e) knowingly contravenes a term or condition of an approval, an environmental assessment approval, a temporary approval, a certificate of variance or a certificate of qualification;
(f) contravenes a term or condition of an approval, an environmental assessment approval, a temporary approval, a certificate of variance or a certificate of qualification;
(g) knowingly contravenes an order;
(h) contravenes an order;
(i) contravenes Section 32, 50, 55, 59, 60, 62, 67, 68, 69, 71, 75, 76, 79, 83, 89, 115, 124 or 132; or
(j) otherwise contravenes this Act,
is guilty of an offence. 1994-95, c. 1, s. 158; 2006, c. 30, s. 45.

159 (1) A person who commits an offence referred to in subsections 50(1), 67(1) or 68(1) or clauses 158(a), (e) or (g) is liable to a fine of not less than one thousand dollars and not more than one million dollars or to imprisonment for a period of not more than two years, or to both a fine and imprisonment.

(2) A person who commits an offence referred to in Section 32, subsection 50(2), Sections 55, 59, 60 or 62, subsection 67(2), subsection 68(2), Sections 69, 71, 75, 76, 79, 83, 89, 115, 124 or 132 or clauses 158(b), (c), (d), (f) or (h) is liable to a fine of not more than one million dollars.
(3) repealed 2006, c. 30, s. 46.

(4) A person who commits an offence referred to in any other provision of this Act is liable to a fine of not more than five hundred thousand dollars.
1994-95, c. 1, s. 159; 2006, c. 30, s. 46.

Environment has appropriately sought to rely on the exemption for investigations under s. 15. The investigators, referred to by Environment as "Special Constables" are engaging in what can be characterized as law enforcement by definition. The question becomes one with respect to "harm."

The issue of "harm" or "could reasonably be expected to harm" is part of the consideration of whether or not the exemption is applicable. In Nova Scotia Review Report *FI-04-09(M)*, the Review Officer stated:

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. (4th) 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 (CanLII), (2003) NSCA 124].

The test regarding harm comes from the Federal Court of Canada case, *Canada (Information Commissioner) v. Canada (Prime Minister) (T.D.), [1993] 1 F.C. 427,* which states:

Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm would result from disclosure of specific information.

. . . the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.

Claiming ss. 15(a) and (c) is not sufficient. Environment had to demonstrate that a clear and direct linkage between the disclosure of the information and the harm alleged. Environment did not do so in either of its decisions or in its Representations in the formal Review. In Nova Scotia Review Report *FI-07-72*, I stated**:**

Regarding whether or not the release of all or part of the responsive Record would harm law enforcement or investigative techniques currently in use, there is nothing in the Record itself that points to anything that is unique to child welfare investigations or their associated techniques. Section 15 is a discretionary exemption that requires the public body to provide the Review Office with evidence as to how it exercised its discretion to refuse the Record because the law enforcement exemption applies. That evidence must demonstrate that disclosure could reasonably be expected to harm law enforcement, harm the effectiveness of investigative techniques or reveal the identity of a confidential source. The Society failed to provide any evidence to support its reliance on this exemption.

In a recent Review Report, I found that Community Services could not refuse access to all of the Department's Child Protection Services Policy Manual wherein I stated:

> *As Community Services did not provide any evidence that the disclosure of the information to the Applicant could reasonably be expected to harm the effectiveness of techniques other than theoretically and some of the severed material is already in the public domain, the exemption in s. 15(1)(c) is not applicable to this Record;*
> . . .
> *First, in order to meet the statutory test of "could reasonably be expected to harm" and thus make out the exemption applies, the public body must be able to show probable harm.*

On a review of the Record, I find that there is nothing in the documents withheld during the investigation, which if released to the Applicant, would have resulted in harm to the investigation or the Environment's investigative techniques.

In order to meet the "investigative technique or procedure" test, the institution must show that disclosure of the technique or procedure to the public could reasonably be expected to hinder or compromise its effective utilization. The exemption normally will not apply where the technique or procedure is generally known to the public [Orders P-170, P-1487]. The techniques or procedures must be "investigative". The exemption will not apply to "enforcement" techniques or procedures [Orders P-1340, PO-2034].
[ON Order PO-2647]

The reality is that in numerous instances, pages of what were referred to as the "Evidence" or "Investigation" file, were released to the Applicant in the releases prior to the June 24, 2008 decision. At no time were these pages ever identified to the Applicant as part of the documents that made up the investigation file. In order to meet the test, the harmful result must come from the release of the information. It does not matter whether the release was inadvertent or intentional or whether Environment identified the Record as such to the Applicant. Clearly no harm resulted and Environment did not argue in its Representations that any harm resulted from the release to the Applicant.

The fact that the investigation is ongoing does not mean the exemption will automatically apply or imply that the harm test is met. The British Columbia Commissioner has stated this principle in a number of cases*:*

I have noted in past orders that the fact that an investigation is ongoing is not enough on its own for s. 15(1)(a) to apply. It is necessary to show that disclosure could reasonably be expected to harm a law enforcement matter, in this case, an ongoing investigation.
[BC Order F05-24]

Obviously, disclosure of information in the records does not satisfy the harms-based test in s. 15(1)(a) simply because there is an ongoing Langley bylaw enforcement investigation. To summarize what I said about the reasonable expectation test in Order No. 323-1999, a public body must adduce sufficient evidence to show that a specific harm is likelier than not to flow from disclosure of the requested information. There must be evidence of a connection between disclosure of the information and the anticipated harm. The connection must be rational or logical. The harm feared from disclosure must not be fanciful, imaginary or contrived.
[BC Order 00-01]

The mere fact of an ongoing investigation is not sufficient to meet the test in the s. 15 exemption. I find that the s. 15 exemption did not apply to this Record.

Environment Act – Intersecting Access Provisions

This case presents a unique situation. Under the *Environment Act* a person has a right to complain about an environmental concern. The Applicant in this case filed a complaint and as a result had a statutory right to be informed as the investigation progressed.

> *116 (1) On receipt of an application pursuant to Section 115, an administrator shall acknowledge receipt of the application and shall investigate all matters that the administrator considers necessary for a determination of the facts about the alleged offence.*
>
> ***(2) Within ninety days after receiving the application, the administrator shall report to the applicant on the progress of the investigation and the action, if any, proposed to be taken in respect of the alleged offence, but information shall not be disclosed to the applicant, if such disclosure would be contrary to the Freedom of Information and Protection of Privacy Act.***
>
> *(3) An administrator may discontinue an investigation if the administrator is of the opinion that the alleged offence does not require further investigation.*
>
> *(4) Where an investigation is discontinued, the administrator shall*
>
> > *(a) prepare a statement in writing stating the reasons for its discontinuance; and*
> > *(b) send a copy of the statement to the applicant and to any person whose conduct was investigated.*
>
> ***[Emphasis added]***

That right to receive a report on the investigation under the *Environment Act* is subject to the access and privacy legislation. The disclosure test provided for in the *Act* is

referentially incorporated into ss. 116(2) of the *Environment Act*. As a result the Applicant's right to information as a complainant intersected with his/her right to access under the *Act.* In this case, s. 15 [investigation] was ultimately the only exemption claimed by Environment and s. 15 is a discretionary exemption. It is trite to state that the Review Officer has no jurisdiction under the *Environment Act.* That being said, as that statute referentially incorporates the test under the access and privacy legislation, the resulting analysis is as follows:

1. The Applicant has a *prima facie* right to access under the *FOIPOP Act*;
2. The Applicant as a complainant under the *Environment Act* has a right to receive a report on the course of an investigation in which s/he was the complainant;
3. If Environment claimed an exception [where the *Act* does not apply to the information] or a mandatory exemption [where a public body has no discretion], the right to information under the *Environment Act* would be curtailed and subject to the provisions of the *FOIPOP Act*;
4. Where the exemption claimed is discretionary, as in this case with s. 15 [investigation], Environment must take the right to information under the *Environment Act* into account when exercising its discretion under s. 15 of the *FOIPOP Act*.
5. In this case, Environment did not acknowledge or appear to take into account any such consideration regarding access rights in its decision-making.

It is suggested that the reason for the 90-day reporting provision under the *Environment Act* is the Legislative Assembly's intention to acknowledge that in environment matters, timing is often of considerable importance. This coincides with the Applicant's concerns about the timing of the response under the access legislation. This case is distinct from an earlier decision from this Review Officer, which read in part:

> *The Original Applicant has not been tasked with auditing the procurement process. If they are concerned as to whether the whole of the process was fair, there are other avenues open to them to seek an audit or file a complaint of maladministration or unfairness.*
> *[FI-07-12]*

As in that case, other avenues were also discussed with the Applicant on October 16, 2008. The difference in this case, however, that distinguishes that finding is that here the Applicant is the complainant under the *Environment Act* and had a statutory right to information, or the very least, the right to have that right to information considered in conjunction with his/her request for access under the *FOIPOP Act.*

On reviewing the 104 pages of the responsive Record referred to as the "Evidence" or "Investigative" file that were withheld, I am unable to find anything that would meet the test of reasonable expectation of harm to an investigation or harm to investigative techniques that would justify Environment withholding the information under s. 15 particularly given the right to information under the *Environment Act.* In the result, the Applicant has suffered double jeopardy by Environment using s. 15 to deny access to information under two statutes.

FINDINGS:

1. The initial Request for Review made by this Applicant was with respect to a deemed refusal. This was subsequently resolved when Environment apologized and provided a response to the Applicant. Environment, in addition to the apology, offered to reopen the file to permit a further request from the Applicant without charge on a one time basis. The issue of the deemed refusal is not the subject of this Review. The matter of delay, however, is in issue. Environment took 71 days to provide its first decision. I find the issue of timing was sufficiently raised on the Form 7 by the Applicant. Regardless of whether the Amended Form 7 raised the issue of delay, I agree with precedent and the Applicant that the issue of delay is deserving of comment. Notwithstanding that the deemed refusal was cured by Environment making a decision and providing access to some of the Record, I find Environment exceeded the timelines under the statute thus interfering with the Applicant's ability to receive the requested information in a timely fashion. This failure to respond without delay was inconsistent with the duty to assist.
2. The head of a public body can delegate the processing of Applications for Access to a Record to a person usually referred to as the FOIPOP Administrator. As part of the FOIPOP Administrator's role to make a decision, it is his/her duty to assist the Applicant and to provide a response openly, accurately and completely. In most instances, as a question of best practice, this will include providing an Index of Records either at the time of a public body's initial decision to provide or refuse access to an applicant or at the very least at the time a record is provided to the Review Office once a Form 7 has been filed.
3. Pursuant to ss. 4(2)(b), the *Act* does not apply to material that is a matter of public record. Accordingly, the interviews and articles, websites etc. to which the Applicant refers would not be subject to the *Act*. Throughout the course of the Review process, the Applicant requested and received other information from Environment, which was released under the Routine Access Policy and does not form part of this Review.
4. Any and all correspondence provided to a public body by an applicant is generally speaking not provided with the responsive records as it is assumed that an applicant is in possession of this information. However, in this case, Environment included all correspondence received from the group the Applicant represents in the responsive Record sent to the Review Office. I find that identifying all of the records on file pertaining to the Review Request would have been beneficial, particularly in this case where the Applicant has concerns regarding whether the group's correspondence is in fact on file at Environment. This is where an Index of Records is useful as it makes reference to all information on the record and does not necessitate providing copies of materials provided by an applicant.
5. Environment cited s. 14 [advice to the Minister] and s. 20 [personal information] in Decision #1 dated September 26, 2007. In addition to these exemptions, Environment, in Decision #2 after an audit was done in response to the Applicant's letter accompanying his/her Form 7,.claimed some of the Record was excluded from disclosure under ss. 4(2) as being related to a prosecution that was

not completed, s. 15 [investigations] and s. 16 [solicitor-client privilege]. In its final Representations, Environment did not rely on s. 14, 20 or 16 and only made reference to s. 15 and ss. 4(2) of the *Act.* Because the Applicant only took issue with the s. 15 exemption at issue in this Review, representations from Environment on the other provisions were unnecessary.

6. In the final stages of this Review, Environment withdrew its reliance on ss. 4(2)(i) of the *Act*, which excludes a record related to a prosecution from the purview of the *Act.* Despite ss. 4(2) being withdrawn, I find that at no time did it apply to this Record as there was no prosecution. Though it may have been cited by Environment in anticipation of the investigation potentially resulting in a prosecution, it did not apply to this Record. If any subsection of ss. 4(2) is applicable, the *Act* does not apply and the information is *excluded* as it does not fall under the access legislation. Having said that, as a best practice in order to avoid unnecessary delay, it is appropriate for a public body to claim both that the information is excluded and go on to cite exemptions. This enables the Review Officer to first find whether or not the information is excluded from the purview of the *Act*. If it is not, the Review Officer can go on to make a finding as to whether the exemptions under the *Act* apply. Public bodies should make the distinction clear to applicants. Public bodies need to give notice to applicants and third parties when reliance on an exception or exemption is withdrawn.
7. Subsection 4(2) of the *Act* renders certain information *excluded* from the purview of the legislation. In the case of subsection 4(2)(i), that means access legislation does not apply to "a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed." It is not an exemption whereby a public body may or may not choose to rely on it to withhold information such as under s. 15.
8. There was never any ***prosecution*** in this case at any time and, in particular, not at the time the Application for Access to a Record was made. There was an ***investigation*** being done based on a complaint under the *Environment Act* lodged by the Applicant at the time of the Application for Access to a Record. The Applicant was concerned that Environment could withdraw its reliance on s. 4 so close to the end of the Review. I agree with that concern. I find that in the June 24, 2008 decision Environment advised the investigation was closed but made no reference to s. 4 in that letter. Merely not referring to it is not sufficient to let the Applicant know it is no longer being claimed in the course of the Review. That was the time for Environment to specifically withdraw the claim to the exception under s. 4 and thereby give notice to the Applicant.
9. Both Environment's access decisions and its delay in responding to the Applicant and the Review Office were done prior to the Department of Environment and Labour becoming two separate departments. The delay by Environment and Labour, as it then was, was inordinate in both cases and not in accordance with the legislation. There has been an inordinate expenditure of time and resources in this matter. It should be remembered that transparency and openness as contemplated by the purposes of the statute is cost-effective.
10. When a complainant's right to information under the *Environment Act* intersects with an applicant's right to access information under the *FOIPOP Act,* Environment must take this factor into consideration in exercising its discretion

under s. 15. The principal issue for the Applicant is whether or not a record can be withheld because it is part of an ongoing investigation. I find that, as here, where the Applicant is also the complainant under the *Environment Act,* the Applicant's right to access information pursuant to two statutes intersect. I find Environment must take into account the rights under the environmental complaint process when exercising discretion under the s. 15 exemption of the *FOIPOP Act,* with respect to an ongoing investigation.

11. In addition, I find nothing in the 104 pages of the Record referred to as the "Evidence" and "Investigation" file that would support a finding that harm would result to the investigation or investigative techniques if released to the Applicant. In support of this finding, I stress that no evidence was provided by Environment to demonstrate harm or a reasonable expectation of harm.
12. Once the investigation was complete, and no prosecution followed, Environment made a disclosure decision regarding the Record, which was released to the Applicant. The Applicant was informed by Environment of the right to Request a Review of this new decision. The Applicant chose not to Request a Review of Environment's last decision with respect to disclosure.
13. The Applicant was concerned about the manner in which s/he had been treated by Environment staff in relation to its investigation and his/her questions to Environment and about the fact that the delay may have caused harm to the environment. The *Act* does not require a public body to answer questions about the contents of the Record, though as in this case, it may choose to do so. Similarly, these are not matters within the jurisdiction of the Review Office; the manner in which the Applicant was treated and the subject matter of the Record. In this regard, the Applicant was informed of other available avenues, which s/he may wish to pursue, including a complaint to the Ombudsman.
14. Having said that, I find that one of the reasons that the statutory timelines for responding to an Application for Access to a Record is so a public body's response is of some utility to an applicant. The *Act* provides for extensions where more time is required by a public body. In this case, I find that Environment did not meet its duty to assist as it did not meet the timelines, did not provide an explanation for the delay and did not seek permission to be delayed in its response.
15. When filing the Application for Access to a Record, the Applicant requested a fee waiver. Environment waived all processing fees "[i]n light of the delay in getting these records to you, and in the spirit of the Act." In addition, Environment offered to extend the scope of the request for a period of approximately two additional months at no additional cost to the Applicant. Both of these determinations by Environment were appropriate and in keeping with the duty to assist.
16. The statute does not include specific instruction on how a public body is to inform an applicant that full pages have been withheld from the Record provided. The requirement to be open, accurate and complete, however, would suggest that best practice would be to indicate the retracted page(s) and the exemption claimed on it and/or to provide an Index of Records that includes reference to the missing page(s). When the Form 7 was initially filed there was a concern that only one page of a briefing note had been provided to the Applicant. Environment

undertook a second search at the request of the Review Office and subsequently provided the second page of the Briefing Note to the Applicant. This issue was resolved prior to the matter coming to formal Review but it is an indication that the original Record provided to the Applicant was not complete.

17. Regarding the information with respect to the investigation conducted by Environment, while the Investigation was ongoing, the Applicant was provided with some of the evidence related to that Investigation but the portion of the Record was not identified as such. Once the Investigation was closed, the Applicant was provided with the remainder of the Record subject to applicable exemptions. The decision by Environment with respect to the Investigation file released to the Applicant is not at issue in this Review as the Applicant chose not to file a Form 7 with respect to this last decision by Environment.
18. I find that Environment has not demonstrated and the Record does not reveal that harm would result from the release of the portion of the Record related to the ongoing investigation. In addition, the Applicant had the right to information about the investigation under the *Environment Act* which tips the scales in his/her favour to have the discretionary exemption applied in his/her favour. I find that Environment did not exercise its discretion appropriately.
19. The Applicant was concerned about the "legalese" in the *Act.* This is a concern for many citizens and has been addressed by the Review Officer's issuing of the *Respecting Your Access and Privacy Rights: A Citizens' Guide for Nova Scotians* that is available in all public libraries, Access Nova Scotia centres and MLA constituency offices.

RECOMMENDATIONS:

I make the following recommendations to Environment:

1. Where an applicant is a complainant under the *Environment Act* and the Application for Access to a Record relates to that investigation, take this factor into account in exercising its discretion under s. 15 of the *Act* with respect to the Application for Access to a Record.
2. In future, provide an Index of Records to applicants with its decision letters, as a best practice in responding to Applications for Access to a Record.
3. Continue with its recently stated commitment to adhere to statutory timelines in processing future Applications for Access to a Record.
4. When a claim to an exception or exemption is withdrawn during the Review process, give notice to the applicant and, where appropriate, third parties, regardless of when in the Review process it is withdrawn.
5. When exercising discretion under ss. 15(1)(a) and (c) of the *Act* to refuse access, provide evidence and information specifically to demonstrate the reasonable likelihood of harm resulting from the release of the information.
6. Provide information and direction to the relevant personnel within Environment of the necessity to coordinate efforts with the FOIPOP Administrator as to how to apply the *Act* in reference to s. 116 of the *Environment Act.*

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer