REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-62

Report Release Date: September 30, 2009

Public Body: Department of Community Services

Issues: Has the Department of Community Services ["Community Services"] properly withheld portions of the Record in accordance with the *Freedom of Information and Protection of Privacy Act* ["*Act*"], and, in particular:

1. Whether s. 14(1) of the *Act* allows Community Services to withhold the severed information.
2. Whether Community Services appropriately exercised its discretion under s. 14(1) of the *Act*.
3. Whether ss. 20(1), 20(3)(d) and 20(3)(g) of the *Act* require Community Services to withhold the severed information.

Record at Issue: Pursuant to s. 38 of the *Act*, Community Services has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. The Record consists of four Investigation Reports prepared by an external consultant for Community Services, which were the result of internal workplace complaints initiated by the Applicant.

Summary: An Applicant requested a Review of decisions made by Community Services to sever personal information of third parties from the Record which consisted of four Investigation Reports prepared by an external consultant for Community Services.

Recommendations: The Review Officer recommended the following:

1. Community Services should seek the consent of the Applicant to make his/her identity known to the third parties. Once that step is taken, re-seek the consent of the third parties' consent to the release of the Record in full.

2. Alternatively, if the Applicant does not provide his/her consent to make his/her identity known to the third parties and/or the third parties do not consent to release of the Record in full, Community Services should release the responsive Record as requested by the Applicant with minor severances of the third parties' personal information. These severances should not include any personal information about the third parties related to their employment with Community Services.

Key Words: advice, agent, background information, consent, discretion, employees, employment history, external consultant, Investigation Report, notice, personal information, recommendations, summary, third parties, Union, unreasonable invasion of personal privacy, witness statement, workplace investigation.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 2, 3(1)(a), 3(1)(b), 3(1(i), 3(1)(m), 5(2), 14(1), 20(1), 20(3)(d), 20(3)(g), 20(4), 20(5), 22(1), 22(4), 45.*

Case Authorities Cited: *NS Reports FI-05-32, FI-08-66; ON Orders P-118, MO-2222, M-444; NL Order A-2009-002; BC Order F-05-32, F-01-53; R. v. Fuller (2003), 213 N.S.R. (2d) 316 (S.C.); Re House, [2000] N.S.J. No. 473 (S.C.); Dickie v. Nova Scotia (Dept of Health), [1999] NSCA 7239.*

Other Cited: *BC FOIPP Act Policy and Procedures Manual.*

REVIEW REPORT FI-07-62

BACKGROUND

On June 20, 2007, received by Community Services on June 26, 2007, the Applicant made an Application for Access to a Record by filing a Form 1 Application for Access to a Record, which requested:

> *Investigation report completed by [external consultant] on or around June 7, 2007, and forwarded to [name of Department employee] on June 8th. This report was completed in response to a complaint of personal harassment/failure to make all reasonable provisions for the occupational safety and health of employees.*

On June 29, 2007, the Deputy Minister of Community Services summarized the outcome of the workplace investigation recommendations in a letter to the Applicant. This was unrelated to the Application for Access to a Record.

On July 12, 2007, Community Services gave notice to all third parties that an Application for Access to a Record had been received for information provided by them to Community Services. Community Services also gave notice to the Applicant that those third party notices were required. On July 13, 2007, one third party provided his/her consent to the release of his/her personal information. The remaining third parties objected to the information being released on the basis that it may unfairly damage their professional reputations.

On August 24, 2007, Community Services corresponded with the objecting third parties advising them that it intended to grant the Applicant partial access to the Record requested and gave the third parties notice that they had 20 days to Request a Review to the Review Officer if they objected to the release. No Third Party Requests for Review were received.

On August 24, 2007, Community Services corresponded [Decision #1A] with the Applicant as follows:

> *This is a follow-up to the letter of July 12, 2007, from [Name], FOIPOP Administrator, notifying you that third party notices have been given. After considering the responses, your application for access has been partially granted . . . [pending the 20 day Third Party Request for a Review period].*
>
> *We have removed some of the information from this record as allowed under Section 5(2) of the Act. Information containing advice and recommendations is being withheld pursuant to s.14 of the Act. However, a summary of these recommendations is being provided. In addition, the personal information of third parties, the disclosure of which would result in an unreasonable invasion of their personal privacy, is being withheld pursuant to section 20 of the Act.*

Access to the remainder of the record(s) will be given to you on September 17, 2007, unless there is a request from a third party asking for a review.

On September 17, 2007 [Decision #1B], Community Services corresponded with the Applicant as follows:

This is a follow-up to the decision letter dated August 24, 2007 in which we advised you that you have been granted partial access to the following. . . [original request from Applicant].

Please find enclosed a copy of the severed records. As was stated earlier, we have removed some of the information from this record as allowed under Section 5(2) of the Act. Information containing advice and recommendations is being withheld pursuant to s. 14 of the Act. However, a summary of these recommendations is being provided. In addition, the personal information of third parties, the disclosure of which would result in an unreasonable invasion of their personal privacy, is being withheld pursuant to section 20 of the Act.
[Summary of the workplace investigation recommendations attached to the Decision #1B letter to Applicant.]

On October 19, 2007, the Applicant filed a Form 7 Request for Review, which stated as follows:

The applicant requests that the review officer recommend that the head of the public body give access to the records as requested in the Application for Access to a Record.

A letter from the Applicant requesting that his/her Union be copied on all Review Office correspondence was attached to the Form 7. On February 13, 2009, the Review Office advised the Applicant that it corresponds with either the Applicant or an identified agent, such as the Union representative, for the purpose of the Review but not both. All correspondence continued to be sent only to the Applicant.

On March 8, 2008, with a view to informal resolution, the Review Office provided research regarding information already known to the Applicant and requested Community Services to consider whether additional information could be released to the Applicant.

On May 1, 2008, after reviewing the research provided by the Review Office, Community Services notified the Applicant that additional information was being released [Decision #2] in a letter as follows:

During the mediation process [see NOTE below] *the review office asked us to reconsider the disclosure.*

We have reviewed the file and determined that additional information could be disclosed. Enclosed is a copy of those pages of the report where the additional information is being disclosed to you.

By copy of this letter, we will notify the Review Office of our decision to disclose the additional information to you. The Department will await further contact from that office in regards to whether or not your request for review will be proceeding to the next stage of the review process.

Please be notified that the Department of Community Services is not prepared to do any further disclosure as it would result in breaching third party privacy.

[NOTE: This was not done during the Mediation stage rather it was during informal resolution in an attempt to either resolve the matter completely or to narrow/focus the Review Request.]

On July 28, 2008, the Review Office asked Community Services for more information with respect to the portion of the Record released with Decision #2 and details of which parts of the exemptions were being relied upon.

On August 5, 2008, Community Services provided a response to the queries from the Review Office, which included:

1. A list of the pages of the Record that made up the release with Decision #2.
2. Identification of the subsection being claimed with respect to advice to a public body or a Minister as s. 14(1). The recommendations in the Record were withheld under s. 14(1) but a summary of those recommendations was provided to the Applicant.
3. Clarification that the subsections Community Services was relying on under s. 20 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"] were s. 20(1) and s. 20(3)(d) and (g): unreasonable invasion of a third party's personal privacy, personal information that relates to employment or educational history and personal information that consists of personal recommendations or evaluations, character references or personnel evaluations.

On February 5, 2009, the Applicant provided additional information in response to several inquiries from the Review Office. Details of this Representation will be included in Applicant's Representation below.

Mediation was not attempted in this case.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Community Services has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. The Record under Review consists of four Investigation Reports prepared by an external consultant for Community Services, which were the result of internal workplace complaints initiated by the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

APPLICANT'S REPRESENTATIONS

On February 5, 2009, the Applicant responded to the Review Office with respect to outstanding questions. That Representation was as follows:

1. The summary of the recommendations in the Investigation Reports was provided along with the edited copy of the Record from Community Services.
2. The information removed from the edited version of the Record extends beyond "personal information of third parties."
3. During the investigative process, the outside agent [external consultant] gave every indication to the Applicant and his/her Union representative that they would receive a copy of the Investigation Report. [The Applicant had also submitted a Labour Arbitration case s/he had researched with respect to a person's right to pre-hearing disclosure of an Investigation Report.]
4. The Applicant indicates that s/he has been unable to understand or fully come to terms with the Investigation Report's conclusions based on the information provided and s/he is therefore seeking the entire Investigation Report.

On July 16, 2009, the Review Office invited the Applicant to make a Representation as part of the formal Review process on or before July 31, 2009. This invitation was repeated on August 10, 2009 as nothing had been received. The Applicant was reminded in the August 10, 2009 email that s/he bears the burden of proof under s. 20 of the *Act* to demonstrate that the release of the third parties' personal information would not constitute an unreasonable invasion of their personal privacy.

On August 14, 2009, the Applicant submitted a Representation to the Review Office, which provided as follows:

1. The request to receive a copy of the severed information completed by the external consultant is to assist the Applicant in his or her efforts to understand, accept and move beyond the outcome of the investigation.
2. The Applicant understands that the severing was done under s. 20 of the *Act* suggesting that it was because the disclosure would be an unreasonable invasion of a third party's personal privacy. S/he proposed that there would be no such breach because:

    a. The employment and educational background of all parties were known to him/her because they were people known to him/her as co-workers in his/her professional role.
    b. Much of the information severed was taken from information in the actual witness statements from the four third parties involved, copies of which were given to the Applicant by the external consultant with the consent of the third parties.
    c. Information severed in some parts of the Investigation Reports within the Record was not severed in other sections of the Reports.

d. To the best of the Applicant's knowledge, the severed information does not include any references to personal information about the third parties related to health, medical or financial.

3. The information severed under s. 14 relates to analysis, findings, conclusions and recommendations in the Record and prevents the Applicant from understanding the basis of the conclusions. The severed version of the Record:

    a. Provides an unbalanced presentation in each of these areas and the portion severed seems to often reflect when the external consultant was questioning the credibility or actions of the third parties.
    b. Creates difficulty for the Applicant to find a resolution to those issues identified that were not attributed to the Applicant's perception.

4. The external consultant noted in the Reports forming the Record that there was a lack of due process for the Applicant. However, the external consultant did not follow through on his/her promise to provide a copy of the Reports to the Applicant after the investigation was completed and instead referred the Applicant to Community Services. Neither the Applicant nor the Union representative would have consented to the workplace investigation in the first place in the absence of having full disclosure of the respective Reports.

5. In summary, the Applicant submits that:

    a. The request for complete disclosure of the Record is on the basis that a release of such information does not pose an unreasonable breach of privacy on the part of any third party as they are all known to the Applicant.
    b. There is no other avenue of redress for the Applicant to obtain a copy of the complete Report other than under the *Act*.
    c. All the witnesses or third parties provided their testimony under oath and knew it was being transcribed.
    d. Copies of all the actual witness statements made by the third parties were given to the Applicant in the course of the investigation.
    e. What has been severed skews the inferences, conclusions and recommendations in the investigation.
    f. Severing the recommendations fails to acknowledge any accountability on the part of the third parties or the need for any sort of intervention to prevent or address the issues identified.

PUBLIC BODY'S REPRESENTATIONS

In its final Representation dated July 31, 2009, Community Services recapped what had transpired during the course of the Review and provided a timeline of the file. The Representations are summarized as follows:

1. Third party consultations were done and only one of the four consented to the release of his/her personal information. Those third parties who did not give

consent did so because they did not want their identity linked with employment or performance related issues and the disclosure would unfairly damage and impact their future relationships.

2. Community Services released additional information after receiving research from the Review Office.
3. The responsive Record was created by an external independent investigator and submitted to Community Services in confidence.
4. The investigation process allowed an opportunity for the Applicant to review the witness statements of the third parties.
5. With respect to the s. 14 exemption claimed:

    a. The Record does contain advice.
    b. In exercising its discretion to apply s. 14 of the *Act*, Community Services took the following factors into consideration:

        i. The intent of the Report.
        ii. The intent of the Investigator.
        iii. The advice was submitted in confidence to the Deputy Head.
        iv. The recommendations relate to personnel issues, both specific to third parties and broader ones that would impact corporate policy.

    c. Although not required under the *Act*, Community Services provided a summary to the Applicant.

6. With respect to the s. 20 exemption claimed:

    a. The Record contains the personal information of third parties – names, employment history and opinions about them.
    b. Consent was sought from the four third parties and only one person gave his/her consent.
    c. Although they are employees of the Department, the Report is not about their position or a description of their functions as employees, but rather about their performance and employment history, such as service time and evaluation of their duties.
    d. Those third parties who did not consent "felt the disclosure of their personal information would have a direct impact on their reputation as it related to their current role and future career aspirations within the Department and impact work relationships."

7. With respect to information known to the Applicant:

    a. "It would appear that there is an assumption that the Applicant knows about all of the information contained in the Report. It is clear from the content of the Report that most of the information, including statements provided to the Investigator and signed by the Respondents, [were] given to the Applicant, during the course of the investigation."
    b. "The severed information is very specific to the performance of each of the individuals and, most likely is unknown to the Applicant."

ISSUES

The issues in this Review are as follows:

1. Whether s. 14(1) of the *Act* allows Community Services to withhold the severed information.
2. Whether Community Services appropriately exercised its discretion under s. 14(1) of the *Act*.
3. Whether ss. 20(1), 20(3)(d) and 20(3)(g) of the *Act* require Community Services to withhold the severed information.

DISCUSSION

The purpose of the *Act* which has been given a broad and purposeful interpretation, states:

> ***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 public bodies, and*
> > *(v) providing for an independent review of decisions made pursuant to this Act;*
>
> *(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 municipalities and to provide individuals with a right of access to that information.*
> ***[Emphasis added]***

SECTION 14 EXEMPTION

Section 14 of the *Act* is a discretionary exemption that allows a public body to withhold information from an applicant when the Record contains advice or recommendations developed by or for a public body. Section 14 provides as follows:

14(1)The head of a public body ***may refuse to disclose*** *to an applicant* ***information that would reveal advice, recommendations*** *or draft regulations developed by or for a public body or a minister.*

(2)The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.
[Emphasis added]

Background information is defined in the interpretation section of the *Act,* which provides as follows:

3(1)(a) "background information" means

(i) any factual material, . . .

The definition of "background information" is given further clarification in the *Regulations* under the *Act*, which provide as follows:

24(1) For the purpose of subclause 3(1)(a)(i) of the Act, "factual material" means a coherent body of facts, separate and distinct from the interpretations of, reactions to or advice and recommendations with respect of facts.

The Record does contain recommendations from the external consultant who conducted the investigation to Community Services. This does not fall within the definition of background information and, therefore, s. 14 of the *Act* may apply if the recommendations fall within the meaning of advice or recommendations. The *Act* does not define the terms "advice" and "recommendations".

Advice and recommendation have been treated as having the same meaning in relevant caselaw. In essence, the advice or recommendation must lead to a suggested course of action where another responsible party will make a decision. The Ontario Commissioner in *Order P-118*, stated:

Generally speaking, advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.
[Order P-118]

In the case at hand, the external consultant prepared the Investigation Reports that contained recommendations for Community Services to consider and to act upon. Thus the recommendations can be characterized as falling within the meaning of "advice":

[25] The intent of s. 14 is to protect from disclosure advice and recommendations developed within government.

[26] There does not appear to be any judicial interpretation of s. 14 of the FOIPOP Act in Nova Scotia. In John Weidlich v. Saskatchewan Power

Corporation (1997) Q.D.G. No. 834, the Saskatchewan Court of Queens Bench adopted a practical definition of "advice" as follows:

> *[10] I suggest that the meaning of 'advice' in ordinary parlance is to be adopted here, meaning 'primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence', per Rand, J. , in* ***Moodie (J.R.) Co. v. Minister of National Revenue.*** *[1950] 2 D.L.R. 145 (S.C.C.), at p. 148.*

[27] In O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat), supra, MacDonald, A.C.J. of the Nova Scotia Supreme Court, sitting as a Chambers Judge considered the meaning of "advice" in interpreting s.13(1).

[28] The Chambers Judge concluded that "advice is part of the deliberative process", and accepted the views of Commissioner Linden, the Ontario Commissioner in Order 118 that "advice" generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process.
[R. v. Fuller (2003), 213 N.S.R. (2d) 316 (SC)]

Community Services provided a summary of the recommendations from the external consultant's Investigation Report to the Applicant, in accordance with s. 20(5) of the *Act,* which provides:

> *20(5)On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.*
>
> *(6)The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).*

While the recommendations from the external consultant are marked confidential and do contain third party personal information, s. 20(5) of the *Act* only applies to s. 20 and does not apply to s. 14. In other words, Community Services had claimed an exemption under s. 14 of the *Act* with respect to the advice or recommendations in the Record and it is, therefore, not necessary to provide a summary of the recommendations from the Record to the Applicant. In doing so, Community Services went above and beyond in its duty to assist. Under s. 14 of the *Act,* Community Services is authorized to withhold the portion of the Record that constitutes advice.

Once it has been determined by a public body that a discretionary exemption (in this case advice or recommendations to a public body pursuant to s. 14 of the *Act*) is applicable to the information that it wishes to withhold, it must then go through the exercise of discretion to apply the exemption. In other words, just because the exemption is applicable, Community Services could choose not to apply it to the information. When

exercising its discretion to apply the exemption or not, a public body must consider all relevant factors.

> *As the relevant section of the Act reads "may", it is up to a public body to exercise its discretion and to provide its rationale for doings [sp] so to the Applicants. In Review Report FI-06-79, I emphasized the importance of a public body explaining to an applicant in its decision* ***how*** *it exercised its discretion and not simply that it did. I repeat what was said in that case:*
>
> > *In determining how to exercise its discretion, reference to a recent Review issued by this Review Officer, 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]
[Emphasis in the original]

[FI-08-66]

In its decision letter to the Applicant, Community Services did not explain how it had exercised its discretion to refuse access. That explanation would have distinguished between parts of the Record that fell within s. 14 of the *Act* as advice or recommendations and why that information should be withheld. In addition, it would have identified that portion of the Record that more properly fell within the definition of background information and therefore could be released. On review of the Record, I am satisfied that all of the information, including recommendations made by the external consultant, should have been released to the Applicant because of the circumstances of this case; s/he had been advised the external consultant's Report would be made available to him or her and the bulk of the information was already known to the Applicant by virtue of having received the witness statements.

SECTION 20 EXEMPTION

Section 20 is a mandatory exemption, which means that if the information falls within the definition of personal information and its release would be an unreasonable invasion of a third party's privacy, the public body is required ["shall refuse"] to withhold that portion of the Record; that means the public body has no discretion to release the information.

20(1)The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2)In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;
(c) the personal information is relevant to a fair determination of the applicant's rights;
(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;
(e) the third party will be exposed unfairly to financial or other harm;
(f) the personal information has been supplied in confidence;
(g) the personal information is likely to be inaccurate or unreliable; and
(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

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

(d) the personal information relates to employment or educational history;. . .
(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;
[Emphasis added]

The second exemption applied by Community Services was under s. 20 of the *Act.* A Supreme Court of Nova Scotia case, *Re House*, discussed the process to be followed in assessing whether personal information should be released. In that case, Moir J. stated:

I propose to consider this appeal in the following way:

1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.
2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise. . .
3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?
4. In light of any s. 20(3) presumption, and in light of the burden upon the appellant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?
[Re House, [2000] N.S.J. No 473 (S.C.)]

Personal information is defined in the Interpretation section of the *Act*, which provides as follows:

3(1) In this Act . . .

(i) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number,
(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,
(iii) the individual's age, sex, sexual orientation, marital status or family status,
(iv) an identifying number, symbol or other particular assigned to the individual,
(v) the individual's fingerprints, blood type or inheritable characteristics,
(vi) information about the individual's health-care history, including a physical or mental disability,
(vii) information about the individual's educational, financial, criminal or employment history,
(viii) anyone else's opinions about the individual, and
(ix) the individual's personal views or opinions, except if they are about someone else;
[Emphasis added]

Information about an individual's employment history falls within the meaning of personal information. The Nova Scotia Supreme Court has considered the issue of "employment history":

*[45] The term "employment history" is not defined in the **Act**, but both the words themselves and the context in which they are used suggest that the ordinary meaning of the words in the employment context is intended. In the employment context, employment history is used as a broad and general term to cover an individual's work record. As Commissioner Flaherty put it in **Order No. 41-1995; British Columbia (Minister of Social Services)**, [1995] B.C.I.P.C.D. No. 14:*

> *I agree . . . that employment history includes information about an individual's work record. I emphasize the word "record" because in my view this incorporates significant information about an employee's performance and duties. (at p. 6)*

[46] Section 20(3)(d) emphasizes the generality of the expression by speaking not simply of personal information which is employment history, but of personal information which "relates to" employment history. The importance of privacy in this area is further underlined by the specific prohibition of disclosure respecting labour relations matters in s. 21(1) and by the much more confined entitlement to information relating to the "position, functions or remuneration as an officer . . . of a public body . . ." in s. 20(4).

[47] The information in question, in general, relates to the third party's work-related conduct, was obtained as part of an investigation into that conduct by his employer and for the purposes of assessing his job fitness.

> *In my view, the judge erred in finding that it was not information that relates to employment history within the meaning of s. 20(3)(d) of the* ***Act*** *. . .*
>
> *[52] The disputed information, generally, is personal information in relation to employment history. Disclosure of it is presumed to be an unreasonable invasion of the third party's personal privacy under s. 20(3)(d) of the* ***Act****. The question of disclosure therefore turns on whether that presumption is rebutted having regard to the factors set out in s. 20(2). I note that s. 20(2) makes it clear that the presumption in s. 20(3) may be rebutted having regard to all the relevant circumstances. [Dickie v. Nova Scotia (Dept of Health), [1999] NSCA 7239]*
> ***[Emphasis in the original]***

The release of personal information that relates to employment history is presumed to be an unreasonable invasion of a third party's privacy. In *Dickie* the Court went on to say:

> *[55] However, the judge's balancing of the factors was incorrect because of the error in failing to find the disputed information was personal information related to employment history. In the case of personal information related to employment history, the* ***Act*** *presumes that the balance is in favour of privacy because it presumes that disclosure of personal information relating to employment history is an unreasonable invasion of personal privacy. The judge held, in effect, that the citizen's right to know trumps a third party employee's right to privacy, saying that if an employee ". . . apparently or actually misuses the power vested in that employee as a consequence of employment, an aggrieved citizen has a right to be adequately advised of the nature and the results of an investigation into the allegation of wrongdoing. . ."* ***I think the judge erred in reaching this conclusion when the explicit presumption of the Act is the opposite. The error was not in failing to do the balancing but in failing to start the balancing with the presumption in favour of privacy of this type of information.***
> ***[Emphasis added]***
> *[Dickie v. Nova Scotia (Dept of Health), [1999] NSCA 7239]*

Community Services identified four third parties who fell within the definition under s. 3 of the *Act,* which provides as follows:

> *3(1)(m) "third party", in relation to a request for access to a record or for correction of personal information, means any person, group of persons or organization other than*
>
> *(i) the person who made the request, or*
> *(ii) a public body;*

Once it establishes that the Record contains personal information of third parties under s. 20 of the *Act*, Community Services is under a duty to give notice to those third parties. Section 22(1) of the *Act* provides:

> *22(1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the third party a notice*
>
> > *(a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the third party;*
> > *(b) describing the contents of the record; and*
> > *(c) stating that, within fourteen days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.*

Community Services gave notice to four third parties; one consented to the release of all of his/her personal information while the remaining three refused to consent to the Record being released if it identified them in relation to their employment. Community Services relied on s. 20 of the *Act* in its decisions and Representations because the Record contained some personal information of third parties but did not address the issue of "unreasonable invasion." It is not appropriate for a public body to take the position that once there is an identifiable person's name in the Record that it automatically should be severed. This is not correct in all cases and particularly where the name is of an employee of the public body and the information is about his/her position or function as an employee. Section 20(4) of the *Act* provides as follows:

> *20(4) A disclosure of personal information is* ***not*** *an unreasonable invasion of a third party's personal privacy if*
>
> *(a) the third party has, in writing, consented to or requested the disclosure,. . .*
> *(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;*
> ***[Emphasis added]***

The third parties fall within the definition of "employee" under the *Act* that reads as follows:

> *3(1)(b) "employee", in relation to a public body, includes a person retained under an employment contract to perform services for the public body;*

Some of the personal information severed, therefore, would not be an unreasonable invasion of the third parties' privacy in their roles as employees for Community Services.

> *To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.*
> *[ON Order MO-2222]*

Apart from the information in the Record that would be considered not to be an unreasonable invasion of the third parties' privacy, the burden is on the Applicant to demonstrate that the release of that information in the Record will not result in an unreasonable invasion of the third parties' personal privacy. In that regard, the *Act* provides as follows:

> *45(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,*
>
> > ***(a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy;***
> ***[Emphasis added]***

The types of information that has been severed as personal information of the third parties can be summarized as follows:

- Name of the person(s) against whom the Applicant filed a complaint
- Name of Applicant's Supervisors
- Dates of Supervisors' employment
- Employment history and job movement
- Reporting structure
- The identity of persons being discussed, other than the Applicant
- Pronoun(s) referring to the gender of persons, other than the Applicant
- A date which identifies when forms were sent out
- Identity of person(s) disrupting
- Identity of person providing notes regarding attendance figures
- Meeting date
- Identity of person(s) providing critique of the Applicant
- Description of working relationship involving the Applicant
- Initials of third parties
- Third party's feelings
- External consultant's findings
- Third parties' actions
- External consultant's opinions about the third parties' comments
- External consultant's conclusions
- Details of the general complaint made by the Applicant.

The Applicant submits that disclosure of the personal information would not be an unreasonable invasion of any third party's privacy as the information is already known to him/her. The Applicant indicates that s/he was told during the investigation that a copy of the Investigation Report would be provided to him or her and that if that assurance had not been made, s/he would not have participated in the work of the external consultant. I find this position to be reasonable and it is bolstered by the fact that copies of the witness statements were provided to him/her with the consent of the third parties during the workplace investigation. The external consultant and/or the public body could have given notice to the Applicant at the time the workplace investigation began that the Investigation Reports that make up the Record would be available under the *Act* and subject to any appropriate exemptions if that was to be the case. It is unfortunate that the Applicant was led to believe s/he would receive a copy of the Report automatically but in fact had to resort to an Application for Access to a Record under the *Act.*

In addition, the Applicant submits that the severing done by Community Services is inconsistent resulting in information such as the date and place of a meeting being severed in one place and included in another. Also, considerable amounts of the information in the Record are already known to the Applicant as a result of him/her being given the witness statements.

I am satisfied that while the severed information falls within the definition of third party personal information, the Applicant has met his/her burden to demonstrate that in this case the release of that information would not result in an unreasonable invasion of personal privacy for most of the Record. This is supported by caselaw and best practice.

The phrase "unreasonable invasion" is not defined in the *Act.* The *BC FOIPP Act Policy and Procedures Manual* points out:

> *Disclosure of personal information must meet the harm test of being an unreasonable invasion of a third party's personal privacy, for a public body to apply this exception.*
>
> *[BC FOIPP Act Policy and Procedures – Disclosure Harmful to Personal Privacy; Interpretation Note 2 (Section 22(1)]*

The *Manual* also provides guidance on applying the harms test. The manual states that it is incumbent on a public body to consider all the relevant circumstances:

> *Must consider all the relevant circumstances*
>
> *This subsection requires the head of a public body to consider not only the circumstances set out in subsection* [s. 20(2)]*, but also any other circumstances that are relevant to the request. For example, if the requested record is 100 or more years old, a strong argument could be made that disclosure of the personal information contained in the record would not be an unreasonable invasion of a third party's personal privacy. . .*

Paragraphs (a) to (d) support the release of personal information, where it is not an unreasonable invasion of a third party's personal privacy. Paragraphs (e) to (h) support withholding personal information, where it is determined to be an unreasonable invasion of a third party's personal privacy.

In applying this subsection, the public body considers the sensitivity of the personal information that has been requested. For example, disclosure of a person's name and address that appear on a letter expressing an objection to a particular government proposal may or may not be sensitive personal information. This must be determined on a case-by-case basis. Where the personal information is sensitive its sensitivity may diminish over time. However, the sensitivity of an individual's name and address on a record listing persons who contracted venereal disease may remain forever.
[BC FOIPP Act Policy and Procedures – Disclosure Harmful to Personal Privacy; Interpretation Note 2 (Section 22(2))]

[Equivalent subsection for the Nova Scotia legislation inserted]

This is one of the foundational provisions in the *Act* as it requires a balancing between the right to access information and the right to have one's privacy protected.

I note here that section 30 does not prevent the release of personal information, but instead limits such release to situations captured by section 30(2). Section 30, therefore, provides a connection between the access and privacy provisions of the ATIPPA, and in so doing balances the otherwise seemingly contradictory purposes of the legislation as set out in section 3. As such, the balance does not exist within the access provisions, as articulated by Memorial, but instead exists between those provisions and the protection of privacy provisions. Section 30 simply operates to bridge two of the purposes of the ATIPPA: to give the public a right of access to records and to protect individual privacy. As further support on this point, I note as well that section 39(1)(a) of Part IV of the ATIPPA specifically allows personal information to be disclosed "in accordance with Parts II and III." In other words, the ATIPPA expressly allows personal information to be disclosed to an applicant in response to an access to information request, in accordance with section 30(2) for example, without having to contravene the protection of privacy provisions.
[NL Order A-2009-002, at para. 47]

This means that there may be times when the information fits the definition of personal information but it is not an unreasonable invasion for it to be released. This is established by applying the harm's test and considering all relevant factors.

Another factor to consider is where the information in the Record is largely known to the Applicant, having been supplied by him/her or is known to him or her because of the circumstances. In the case at hand, the Applicant was the Complainant, participated in the investigation, was a witness and received copies of the other witnesses' statements with the consent of those witnesses.

The Applicant has established that except for a few minor examples, no harm would result from disclosure of this information. Nothing in Community Services' Representations countered the Applicant's Representations in this regard by showing an unreasonable invasion of privacy or that harm could result from its release. In addition, in the circumstances of this case, to refuse the Applicant access would lead to an absurd result and be contrary to the purposes of the *Act;* a situation described in Ontario *Order M-444*:

> *However, it is an established principle of statutory interpretation that an absurd result, or one that contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose. [ON Order M-444]*

This finding is supported by the fact that the Applicant had all the witness statements from the third parties provided to him/her during the course of the investigation and Community Services was aware of that fact. There are also many examples throughout the Record where in one instance the personal information has been severed while in other instances it has not. This is consistent with a previous case from British Columbia, *F-05-32*, where a public body withheld portions of a workplace investigation. It was found that information compiled as part of an investigation is not characterized under s. 22(3)(g) as "personal recommendations or evaluations, character references or personnel evaluations." The circumstances in this case are distinct from other caselaw because of the Applicant's prior involvement in the investigation and access to the witness statements.

In addition, it was known to Community Services that the third parties had consented during the course of the investigation by the external consultant to the release of their witness statements. Therefore, this was a perfect instance of where the public body could utilize the provision contained in s. 22(4) of the *Act,* which provides as follows:

> *22(4) In complying with subsections (1) and (2), the public body shall not*
>
> *(a) disclose the name of the applicant to the third party without the consent of the applicant; or*
> *(b) disclose the name of the third party to the applicant without the consent of the third party.*

In the circumstances of this case, Community Services ought to have sought the consent of both the Applicant and of all third parties to disclose their respective identities under its duty to assist in providing the responsive Record to the Applicant. Had all of

the third parties known the identity of the Applicant, they likely would have consented to the release of the Record as they did with respect to the witness statements during the investigation.

FINDINGS

I make the following findings with respect to this Request for a Review:

1. During the workplace investigation, the Applicant was given copies of the third parties' written statements in order to be given the opportunity to respond. The Applicant knows who the third parties are because they are the colleagues s/he has worked with over an extended period and about whom s/he filed a complaint. The Reports of the investigation make up the Record.
2. There are binders that contain summaries of witness information, which were not referred to in either Decisions #1 or #2 and have not been provided to the Applicant or the Review Office. This was not dealt with during the Review process as the Applicant had not made search an issue.
3. The third parties took part in the investigation conducted by the external consultant and because they were asked for their consent to share their witness statements, they were aware the Applicant was allowed to provide feedback on the information they provided. On that basis, I find they had no reasonable expectation that the process would maintain their anonymity or that the information they provided was done so on a confidential basis in relation to the Applicant.
4. Community Services abided by the requirement of not disclosing the identity of the Applicant to the third parties and vice versa. However, Community Services did not ask the Applicant or the third parties for their consent to identify them to each other, as is a possibility under the *Act*. Given that the third parties consented during the workplace complaint investigation, Community Services could have taken that step, which is a step that can be read into to s. 22(4) of the *Act.*
5. The Record consists of four Investigation Reports, which largely report on the same or similar circumstances and yet the severing of particular information by Community Services is inconsistently applied. This means that in some instances information severed in one part of the Record is disclosed in another. The way in which the information has been severed results in the Record reading with a biased tone not in favour of the Applicant.
6. The summary, which under the *Act* is used to summarize personal information under s. 20 of the *Act,* was used under s. 14 of the *Act* to summarize the recommendations contained in the four Investigation Reports making up the Record. Notwithstanding that such a summary is not contemplated in s. 14, Community Services did make an attempt using this mechanism to provide some information to the Applicant. This step went above and beyond its duty to assist and is to be commended. The way the summary is constructed, however, leads to the same result; it appears to be to some degree biased in the same way in which the Record has been severed.
7. The third parties are all employees of Community Services. As such, information about their employment including their names is personal information the

disclosure of which does not constitute an unreasonable invasion of their privacy pursuant to s. 20(4) of the *Act.*

8. In the circumstances of this case, removal of third parties' names and professional titles from the Record leads to an absurd result and could be solved by seeking their consent regarding their identities.
9. Community Services knows that all of the parties know one another as they all work for that Department. On that basis, Community Services should have asked the Applicant whether or not s/he consented to the release of his/her identity to the third parties, thereby facilitating their consent to the release of the complete responsive Record.

RECOMMENDATIONS

3. Community Services should seek the consent of the Applicant to make his/her identity known to the third parties. Once that step is taken, re-seek the consent of the third parties' consent to the release of the Record in full.

4. Alternatively, if the Applicant does not provide his/her consent to make his/her identity known to the third parties and/or the third parties do not consent to release of the Record in full, Community Services should release the responsive Record as requested by the Applicant with minor severances of the third parties' personal information. These severances should not include any personal information about the third parties related to their employment with Community Services.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia