REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-07-72

Report Release Date: December 17, 2008

Public Body: Children's Aid Society Inverness – Richmond ["the Society"]

Issue: Whether the Society properly applied s. 15(1)(a), (c) and (d) and s. 20(3)(a), (b) and (g) of the *Freedom of Information and Protection of Privacy Act* ["the *Act*"] in withholding the information sought by the Applicant.

Record at Issue: The Record at issue is a Record of the Children's Aid Society Inverness-Richmond, a child welfare agency, compiled for statutory purposes, containing information regarding an investigation of a complaint filed by a third party with the agency about a child of the Applicant.

Summary: An Applicant requested a copy of personal information contained in the Society's Record about the Applicant and the Applicant's child. The Applicant was not interested in the identities of third parties. Originally the Society did not provide any part of the Record to the Applicant. After receiving further information from the Review Office, the Society made several attempts to provide some information, which did not satisfy the Applicant.

The Review Officer found that the Applicant is entitled to a copy of the Record with the names of confidential informants and third parties' personal information severed.

Recommendations: 1. The Society should release all information previously withheld under s. 15 of the *Act;*
2. The Society should release all information previously withheld under s. 20 of the *Act* with the exception of identifying information about third parties including confidential informants;
3. Any names or identifying information of employees of the Society, regardless of whether or not they are referred to

as collateral contacts, should not be removed, in accordance with s. 20(4)(e) of the *Act*.

Key Words: absurd result, burden of proof, child, child protection, collateral, confidential, could reasonably be expected to harm, in need of protection, informant, law enforcement, notice to third parties, Ombudsman, onus, paramount, parent, personal information, public body, self-generated information, unreasonable invasion of a third party.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act ss. 2, 3(1)(i), 3(1)(j)(i), 4(1), 4(2), 4A(2), 10(1)(c), 15(1)(a), 15(1)(c), 15(1)(d), 20, 20(1), 20(2)(f), 20(3)(a), 20(3)(b), 20(3)(g), 20(4), 20(4)(a), 20(4)(e), 21, 20(5), 43(d), 45(1), 45(1), 45(2), 45(3)(a); Children and Family Services Act, ss. 9(d), 23(1), 94.*

Case Authorities Cited: *NS Review Report FI-07-27; O'Connor v. Nova Scotia 2001 NSCA 132; Cayer v. South West Shore Development Authority 2008 NSSC 349; ON Order M-444; NS Review Report FI-07-59; NS Review Report FI-04-09(M); AB Order 96-019; PEI Order No. 07-001; ON Order PO-2582*

REVIEW REPORT FI-07-72

BACKGROUND

On August 4, 2007 the Applicant requested access to:

> *I [Applicant's name] [parent] of [child's name] request all files of information concerning my [child] [child's name] from Children's Aid, Dept of Community Services in Port Hawkesbury*.

This request was initially sent to the Department of Community Services, which, pursuant to s. 10(1)(c) of the *Freedom of Information and Protection of Privacy Act* ["the *Act*"], was transferred by that Department to the Children's Aid Society Inverness-Richmond ["the Society"]for processing.

On October 11, 2007, the Society sent letters to a list of third parties who were referred to in the Record seeking their views as to whether or not the Society should disclose the information sought by the Applicant. Copies of s. 20 and s. 21 of the *Act* were attached to the third parties' correspondence. The Society advised the third parties that anything they provided verbally or in writing by way of response would be taken into account in making its decision. The Society further advised that once its decision was made, if it resulted in information being released without their consent, the third party[ies] would be given the opportunity to request a Review of the Society's decision to release information by the Freedom of Information and Protection of Privacy Review Officer.

On October 26, 2007, the Society issued the following decision to the Applicant advising that no part of the Record would be released:

> *The subject records are records of a child welfare agency, compiled for statutory purposes. They are by their nature confidential records. After a careful review of the records and of the applicable provisions of the Freedom of Information and Protection of Privacy Act (FOIPOP), the Agency has made the decision not to release the records requested. Access to the records is refused for the following reasons.*
>
> 1. *The records requested are clearly child welfare records, the disclosure of which can reasonably be expected to harm law enforcement, harm the effectiveness of investigative technique or procedures currently used or likely to be used in law enforcement, and/or reveal the identity of a confidential source of law enforcement information pursuant to* ***ss. 15(1)(a),(c),(d)****.*
> 2. *The records requested are clearly child welfare records and include "personal information" as defined by* ***ss. 3(1)(i)****.*
> 3. *The records requested do not fit within the exemptions of* ***ss. 20(4)*** *of the FOIPOP. Third parties identified by the Agency have not provided written, unconditional consents pursuant to notice sufficient to permit disclosure under* ***ss. 4(a)*** *[sic].*

4. *Disclosure of the records requested is presumed an unreasonable invasion of third parties' privacy pursuant to* ***ss. 20(3)(a),(b),(g)****.*
5. *On review of the entire record and consideration of all relevant circumstances including* ***ss. 20(2)(f)*** *of the FOIPOP Act, and the nature of the records as child welfare records, disclosure of the requested documents has been determined to be an unreasonable invasion of third parties' personal privacy.* ***[Emphasis in the original]***

On November 21, 2007 the Applicant filed a Form 7 requesting a Review of the Society's October 26, 2007 decision.

The Request for Review [Form 7] states:

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

On December 20, 2007, the Society provided an overview of the sections of the *Act* on which the agency relied in denying access. Details of that overview will be included below under the Public Body's Submission.

On February 25, 2008, the Review Office provided the Society with a copy of a recent Review Report from the Nova Scotia Review Officer that involved similar facts and asked the Society to reconsider its position with respect to access to the Record. Review Report FI-07-27 was made public on November 9, 2007, two weeks after the Society made its decision in this case. That Review Report involving this Society only involved the exemptions under s. 20 of the *Act.*

In response, the Society released some information on March 13, 2008, by providing the Applicant with a Summary of the Record pursuant to ss. 20(5) of the *Act.* The Applicant was not satisfied with the Summary.

On May 1, 2008, the Review Office provided the Society with research regarding "known information." The Society was advised by the Review Office as follows:

> *Some of the information being withheld was actually provided by the Applicant. The majority of the information consists of conversations with the Applicant. Therefore, in most of the Record, the information severed from the documents is information that is known or would be known to the Applicant.*

The Review Officer requested that the Society once again reconsider its decision to withhold the Record in its entirety based on the research materials provided including a very recent decision of the Nova Scotia Review Officer that involved very similar facts and involved this Society. This proposal to the Society was to help to focus the investigation and to clarify exactly which portion of the Record was at issue.

On May 15, 2008, the Society provided an additional portion of the Record to the Applicant. The Society released edited portions of the Applicant's known information

subject to deletions. The information included reference to the meetings and telephone calls that the Applicant had with the Society with names of third parties, provided by the Applicant, severed. The accompanying letter provided in part:

> *The Agency record includes contacts with you and information provided by you. The Agency is prepared to provide you with copies of these contacts in response to the Review Office's request and to supplement the summary already provided.*
>
> *Because your information included unsubstantiated hearsay statements about identified minor children, the enclosed material is edited to remove those identities. Please note that the Agency considers this information, including the unsubstantiated hearsay statements about identified minor children, to comprise part of its confidential child welfare investigative records. These records and the information contained therein are not for publication, dissemination or distribution.*

The Applicant remained dissatisfied with the Society's second release of information. The Applicant is not looking for the personal information of third parties such as their names or the record of interviews or contacts with them. The Applicant does want access to the following information, which will be the focus of this Review:

- The process undertaken by the Society such as the steps taken and the outcomes of the investigation; and
- Interviews and contacts with professionals involved such as the school, doctors and caseworkers as the Applicant is already aware of their involvement.

On August 12, 2008 the Applicant refused Mediation. On August 22, 2008, the matter was referred to the Review Officer for formal Review.

On September 22, 2008, the Review Officer asked both parties to consider one further attempt at an informal resolution notwithstanding that Mediation had been refused by the Applicant. On a without prejudice basis the Society agreed. The Applicant also agreed. The attempt was not successful. On October 17, 2008 the Request for Review was, therefore, returned to the formal Review process.

By letter dated October 17, 2008, both parties were invited to make final representations to the Review Officer by October 31, 2008. Written representations were received from the Applicant dated October 24, 2008 and from the Society on October 31, 2008, details of which will be discussed below.

RECORD AT ISSUE

The Record at issue is a Record of the Children's Aid Society Inverness-Richmond, a child welfare agency, compiled for statutory purposes, containing information regarding an investigation of a complaint filed by a third party with the agency about a child of the Applicant. The original request from the Applicant was for

information dated back to 2007. The Record identified by the Society was for the period from March 2007 through to and including May 2007.

APPLICANT'S SUBMISSION

During the Review process, the Applicant indicated to the Review Office by telephone that s/he:

1. Was not satisfied with the amount of information released by the Society;
2. Was not looking for personal information including the names of interviewees/contacts of third parties;
3. Wanted the focus of the Review to be the process – steps taken by the Society and the outcomes;
4. Wanted information resulting from interviews/contacts with professionals involved [listed examples] as the Applicant already knew about their involvement.

When the matter was first referred to formal Review, no written Submission had been received from the Applicant. In response to my letter to the Applicant dated October 17, 2008, the Applicant provided a Submission dated October 24, 2008, which can be summarized as follows:

1. The Applicant's Submission recites the original access request made to the Society;
2. The Applicant states that the main concern is what process was carried out by the Society on a report made to it by a third party based on information s/he provided to professionals working for that third party;
3. The information the Applicant provided to a third party concerned a potential risk to his/her child;
4. The Applicant reiterates his/her concern about how the situation was handled and what process was carried out in the investigation by the Society;
5. The Applicant asks that his/her request be considered again.

PUBLIC BODY'S SUBMISSION

By correspondence dated December 20, 2007, the Society provided an overview of the sections of the *Act* upon which it relied in denying access, which can be summarized as follows:

1. Law Enforcement [ss. 15(1)(a), (c), (d)]: the child welfare records are comprised of law enforcement and investigative records. Disclosure outside the context of child protection or criminal court proceedings could reasonably be expected to harm the Society's ability to investigate and intervene to protect children under its statutory mandate. Such disclosure could have a chilling effect on child welfare referrals. As the Applicant is the parent of the child in this case it is unnecessary to inform the Applicant as s/he was its principal source;
2. Personal Information [ss. 3(1)(i)]: the Record contains the names of referral sources, collaterals and other third parties, all of whom the Society owes a duty of

confidentiality. In addition, the Society takes the position that the identities of people must be protected and kept confidential except as required to be disclosed in child protection court proceedings. The original referral source agreed to have his/her identity disclosed to the Applicant and this was done and thus further disclosure is not warranted or appropriate. The Society believes that any release of material under an access request that identifies a referral source undermines the integrity of the investigation, intervention and enforcement scheme under child welfare legislation. Names of collaterals provided by the Applicant need not be disclosed as they are, in this case, redundant. If the names of collaterals were not supplied by the Applicant, their release would be improper as a matter of principle. Similarly, disclosure of particulars of investigative interviews is opposed. Release of the names of minor children is considered contrary to the agency's mandate. The bulk of the information on the Record relates to allegations of a child welfare nature that is sensitive and potentially damaging and thus the identities of children should not be available through the FOIPOP process;

3. Disclosure presumed unreasonable invasion of personal privacy [ss. 20(3)(a), (b), (g)]: the Record indicates a mental health intervention regarding the subject child that the Society considers highly confidential. The Society claims that the information is not properly subject to an application under the *Act.* It was the Applicant who engaged the services and the Applicant, therefore, has direct access to those professionals;
4. Personal information was supplied in confidence [ss. 20(2)(f)]: The child welfare referral information was supplied in confidence and must be protected from disclosure, subject only to release through child protection court proceedings.

   [Note: Some of the paragraphs of s. 15 and s. 20 listed above by the Society were later the subject of clarification. See below.]

Once the matter was referred to formal Review, the Society provided another Submission dated August 22, 2008. A summary of that Submission follows:

1. The Society noted that it had already provided the Applicant with a Summary of the Record and excerpts from the Record documenting contacts with the Applicant;
2. The Applicant has been denied that portion of the Record containing third party identifying information and confidential child welfare investigation information;
3. The Society was willing to participate in Mediation;
4. The Society stressed the seriousness of the risks attendant on the publication of the names of minor children as they appear in any of its case recording reports. The Society is concerned that the lack of safeguards in the access to information process as compared to the protections in Court proceedings. Under the *Act* the "publication of the Agency's confidential record by means of distribution to an applicant in a FOIPOP process creates risk of improper dissemination and misuse contrary to the best interests of any such named children." This is compared to Court protections built in to child protection proceedings such as parties' opportunity to examine and cross-examine and the statutory protections against publication as provided for in s. 94 of the *Children and Family Services Act.* The

Society submitted that where there is no child protection proceeding under way that children and families are unprotected other than through its practices and policies of confidential handling of this material;

5. The Society submits that notwithstanding that the access request is for copies of interviews with "professionals" who are persons that the Applicant is already aware of, these should not be released. Possible sources of child welfare information, the Society submits, are persons whose personal privacy requires protection and to argue for release implies that the information they provide expressly in confidence is not entitled to protection;
6. The Society emphasizes the fact that the *Children and Family Services Act* relies upon and requires reporting of suspected child abuse and potential child risk by everyone who may come into possession of this type of information and requires that this information be provided in confidence and respect that confidentiality regardless of the outcome of the report;
7. The Society reports concern about the use or dissemination of child welfare records once disclosed through the FOIPOP process. This lack of control is inconsistent with the existing regime of child welfare reporting and investigation;
8. The Society considers itself to have an obligation to protect the confidentiality of this highly sensitive material and will resist access insofar as it places the information in jeopardy;
9. The Society continues to rely on the exemptions from disclosure previously cited.

Following the final attempt at informal resolution, the Society made its final Submission to the Review Officer in a letter dated October 31, 2008, which provided as follows:

1. The search of the Society's files in response to the access request located a Record regarding the Applicant's child dated from March 26, 2007 to May 1, 2007 and was comprised of a completed intake referral form and case recording reports. The Society describes the Record as follows:

> *The case recording reports comprise: the information from the intake referral form; social worker consultation(s) with supervisor; social worker contact(s) and interview(s) of referral source and collaterals identified by the referral source; contact(s) and interview(s) of the Applicant[parent]; attempted interview of the child with the Applicant [parent's]consent and in [his/her] presence; and contact(s) and interview(s) of the [professional] involved with the child, pursuant to consent from the Applicant [parent].*

2. The referral source made a child welfare referral to the Society in accordance with the statutory duty to report, which provides as follows:

> *Children and Family Services Act*
> *23(1) Every person who has information, whether or not it is confidential or privileged, indicating that a child is in need of protective services shall forthwith report that information to an agency.*

3. The investigation of the referral information concluded at the intake stage without the opening of a protection case file;
4. The Society repeated the initial basis on which the Applicant was refused the entire Record; because the information was submitted in confidence, was highly sensitive and confidential, and contained third party personal information the release of which would contravene the privacy interests of those third parties;
5. The Society submits that child welfare records are by their nature highly confidential and are not otherwise disclosed by the Society except in court proceedings where the information is subject to specific protections against release or exposure. They expressed concern about the production of the Record in reproducible form and without any restrictions on dissemination;
6. The Society did provide the Applicant with a Summary of the Record that: avoided disclosure of third party personal information including the names of other children reportedly identified by the Applicant's child, avoided reproduction and distribution and dissemination whether deliberately or inadvertently, avoided creating a copy of the responsive Record that set out the particulars of the allegations involving the Applicant's child that would then be out of the Society's care and control, protected against the risk of harm to the Applicant's child and others that could result from the release of the information. The Summary pursuant to ss. 20(5) of the *Act* confirmed a referral was received, investigated and not substantiated and that the Applicant was appropriately addressing the situation that involved his/her child;
7. As the Applicant was not satisfied, at the suggestion of the Review Office, the Society produced and disclosed additional portions of the Record to the Applicant including "known information", a copy of which was provided to the Review Office with the following position in the cover letter:

> *A copy of the excerpted version of the records provided to the Applicant on 15 May 2008 is enclosed herewith. That copy is annotated with reference to the sections of the Act on which the Agency relies to withhold access.*

8. The Society was made aware by the Applicant that his/her primary concerns were about the process undertaken during the investigation.
9. All inquiries made by the Society staff were discrete and consistent with obligations under the child welfare legislation and limited to what was necessary in order to confirm whether a child welfare risk was present. The Society takes the position regarding the risk of disclosure under the *Act* that exposure of such highly sensitive information, that may or may not prove to be accurate, could cause harm to the Applicant's child;
10. The Society submits that release of this kind of record will have a chilling effect on child welfare referrals from members of the public, and professionals and collaterals. The Society believes such referrals are critical to child protection and it must be allowed to protect that information against exposure except in Court proceedings;
11. It remains the position of the Society that child welfare records are of a particularly sensitive nature and deserve particularly stringent protection from disclosure because disclosure risks harm to children. Such records are compiled in

the ordinary course of the business of child welfare risk assessment and are compiled only for the purpose of child protection and not for any other purpose. The release of such a record under the *Act* leaves its subsequent use and potential misuse wide open and outside the control of the proper custodial authority.

When the matter was referred to formal Review, a discrepancy in the exemptions claimed under the subsections of s. 15 and s. 20 of the *Act* was discovered between what was claimed by the Society formally and informally. In order to ensure accuracy, this was brought to the attention of the Society. By letter dated November 25, 2008, the Society clarified its intentions: to rely on ss. 15(1)(a), (c) and (d) and also ss. 20(3)(a), (b) and (g).

DISCUSSION:

This is a request by the Applicant to access personal information. The purpose of the legislation is set out clearly in the *Act* and reads as follows:

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]

Personal information is defined in the *Act*, the relevant portion of which reads as follows:

3(1)(i) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number, . . .
(iii) the individual's age, sex, sexual orientation, marital status or family status, . . .
(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.

In this case, the Applicant's Application for Access to a Record was for personal information about the Applicant and the Applicant's child. The Society acknowledges that the Record is made up of, at least in part, his/her personal information.

With respect to the child of an Applicant, the *Act* states:

43 Any right or power conferred on an individual by this Act may be exercised . . .

(d) where the individual is less than the age of majority, by the individual's legal custodian in situations where, in the opinion of the head of a public body, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual;

There was no issue with respect to the Applicant's entitlement, as a parent, to make this Application for Access to a Record for personal information about his/her child.

The onus is on the Society to demonstrate why the Applicant should not be given access to the information requested. With respect to personal information about a third party, the Applicant bears the onus to demonstrate how the disclosure of information would not be an unreasonable invasion of a third party's privacy. In that regard, the *Act* provides as follows:

45 (1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

(2) Where the record or part that the applicant is refused access to contains personal information about a third party, 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.

(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;*

Public body is defined in s. 3 of the *Act* to mean:

> *3(1)(j)(i) a Government department or a board, commission, foundation, agency, tribunal, association or other body of persons, whether incorporated or unincorporated, all the members of which or all the members of the board of management or board of directors of which*
>
> > *(A) are appointed by order of the Governor in Council, or*
> > *(B) if not so appointed, in the discharge of their duties are public officers or servants of the Crown,*
>
> ***and includes, for greater certainty, each body referred to in the Schedule to this Act** . . .*
> ***[Emphasis added]***

The Schedule to the *Act* lists under Community Services:

> *an agency within the meaning of the Children and Family Services Act.*

Section 4(1) of the *Act* stipulates what records fall within the application of the *Act* and states:

> *This Act applies to all records in the custody or under the control of a public body, including court administration records.*

Section 4(2) of the *Act* lists where the *Act* does ***not*** apply to a record and is silent with respect to an agency within the meaning of the *Children and Family Services Act.*

Section 4A(2) of the *Act* lists enactments that restrict or prohibit access by any person to a record that specifically provides those provisions are paramount over the *Act.* There is no reference to the *Children and Family Services Act.*

Nova Scotia Courts have held that in defining what public bodies fall under the *Act*, the legislation is to be given broad and liberal interpretation. The Court of Appeal has stated:

> *40 Thus, it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information, so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.*

41 The FOIPOP Act ought to be interpreted liberally so as to give clear expression to the Legislature's intention that such positive obligations would enure to the benefit of good government and its citizens.
[O'Connor v. Nova Scotia 2001 NSCA 132]

This case has recently been followed in the Nova Scotia Supreme Court in the context of what constitutes a public body in the municipal context, which held:

41 In my view, based upon the intention of the legislature in enacting Part XX of the MGA, the provisions of the MGA ought to be interpreted liberally. A liberal interpretation of the definition of "municipal body" includes SWSDA. The Legislature could not have intended that an organization like SWSDA, with the objects set out in its Memorandum of Association, with the membership it has and provided with government funding (municipal, provincial and federal), would be an organization to which freedom of information legislation would not apply.
[Cayer v. South West Shore Development Authority 2008 NSSC 349]

The Record was compiled by the Society pursuant to its statutory obligations with respect to the protection of children. The *Children and Family Services Act* defines an agency's function as follows:

9 The functions of an agency are to
(d) investigate allegations or evidence that children may be in need of protective services.

The following summarizes the basis on which the Record is being refused to the Applicant by the Society:

1. The Record is a child welfare file and contains some information that falls within the definition of personal information of the Applicant, his or her child and third parties;
2. Pursuant to s. 20 of the *Act*, the Society argues that to release the Record would disclose personal information and thus constitute an unreasonable invasion of a third party's personal privacy because in this circumstance the personal information was supplied in confidence, involves personal information about medical or other health care, was compiled as part of an investigation into a possible violation of the law, and consists of personal recommendations or evaluations;
3. Pursuant to s. 15 of the *Act*, the Society submits it is entitled to refuse disclosure of information if it could reasonably be expected to harm law enforcement, investigative techniques and procedures used in law enforcement, or reveal the identity of a confidential source of law-enforcement information.

The Record does contain personal information about the Applicant, the Applicant's child and third parties which information was compiled in the context of an investigation into a complaint regarding a child protection matter. The relevant sections

of the *Act* regarding personal information, upon which the Society relies, are highlighted below:

> *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. . .*
>
> > *(f) the personal information has been supplied in confidence;*
>
> *(3)A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if*
>
> > *(a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;*
> > *(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;. . .*
> > *(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;*

In its initial decision to the Applicant, the Society stated:

> *The subject records are records of a child welfare agency, compiled for statutory purposes. They are by their nature confidential records.*

The Society goes on to refuse access to all of the Record. At the time of responding to the Form 1, Application for Access to a Record, the Society seemed to infer that if a record is a child welfare file, it is not available under the *Act* because it is by its nature information provided in confidence and which should be kept confidential. This type of record is highly sensitive and, as the Society did in this case, the question of release should be treated very carefully. The position advanced by the Society is that access to child protection files should be restricted because to do otherwise would place the entire system in jeopardy of becoming dysfunctional. This is because child protection investigations are so dependent on alerts and information provided by professionals and members of the public. The confidential informants need to be able to maintain their confidence in a system that will keep their identities and the information they provide confidential.

The Society states that if that information and identification is disclosed through the access to information process it will defeat the whole purpose of child protection legislation. In principle, I find the argument compelling and appreciate what the child

protection agency is trying to accomplish in pursuing its duty to protect the confidential information and its sources. The Society, however, cannot try to shield its records as if it were not a public body under the *Act.* I suggest, rather, that it is a matter of finding a balance between the need to keep child protection informants' and collaterals' identities protected and the right of an applicant to access his/her personal information. By the end of this Review, I believe the Society has recognized that the Applicant was entitled to access.

The Society appeared concerned about releasing a copy of the Record stating concerns about its lack of control over dissemination of it following it being provided to the Applicant. While the Society may have legitimate concerns in this regard as the agency responsible for child protection, why an applicant wants information or to what use s/he intends to put it, under the *Act*, is not a relevant consideration in determining whether an applicant is entitled to access. The way in which to manage this concern may, however, be the manner in which access is provided.

Much of the information contained in the Record has been provided by the Applicant. There is considerable case law on access requests being refused by public bodies where "the information has been provided by the Applicant him or herself."

In the Nova Scotia Review Report FI-07-27, a similar case, I found that an applicant seeking personal information should be entitled to the Record with the third party information severed. In that case, I relied on Ontario Order M-444, in which the following was stated:

> *However, it is an established principle of statutory interpretation that an absurd result, or one which 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]*

Where, as here, the personal information is largely information provided by the Applicant him/herself, once third party information and identity have been severed, it cannot be said that it should be shielded from access because it was supplied in confidence or would reveal a confidential source of law-enforcement. This was discussed extensively in FI-07-27 and need not be repeated here.

With respect to s. 15 of the *Act*, the relevant subsection reads 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;
(d) reveal the identity of a confidential source of law-enforcement information;

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;
[NS Review Report FI-07-59]

The public body in Review Report FI-07-59, the Department of Community Services, accepted the recommendations of the Review Officer and released the Record, the Child Protection Services Policy Manual, in its entirety.

In that case, I said the following:

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.

> *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 <u>probable</u> 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].*
> *[NS Review Report FI-04-09(M)]*

A Federal Court of Canada case made it clear that there needs to be a clear and direct linkage between disclosure and the alleged harm.

> *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.*
> *[Canada (Information Commissioner) v. Canada (Prime Minister) (T.D.), [1993] 1 F.C. 427]*

[NS Review Report FI-07-59]

The Society also relies on s. 15(d) of the *Act* to argue that disclosure would reveal a confidential source. Confidential source has been defined in Alberta Order 96-019. It can be summarized as:

> *Someone who supplied law enforcement information to a public body on the implicit or explicit assurance that his or her identity will remain secret.*

In a similar case in Prince Edward Island to the one at hand, the Commissioner found the public body had appropriately applied the exemption because it was based on proof of evidence and not mere conjecture. The PEI Order stated:

> *The Public Body contends that in this case, "who said what about whom" is extremely sensitive information and because the pool of interviewees is so small, there is no doubt that comments could be attributed to identifiable employees who gave statements with the assurance that their comments would not be repeated, especially to other employees.*
>
> *Records 26 to 40 are hand-written notes of interviews conducted with witnesses to the complaint at issue. Having already determined under section 15 above that the investigation at issue is a law enforcement investigation in accordance with the FOIPP Act, I am left to determine whether disclosure of these records could reasonably be expected to reveal the identity of a confidential source in this investigation.*

Section 18 requires that the Public Body show a reasonable expectation of harm. I have dealt with this test in previous orders of this Office, most recently in Order 06-007. To satisfy the test, evidence must be provided to show:

(i) a clear cause and effect relationship between the disclosure and the harm which is alleged;
(ii) the harm caused by the disclosure constitutes "damage" or "detriment" to the matter, and not simply hindrance or minimal interference; and
(iii)the likelihood of harm is genuine and conceivable.

Further, pursuant to Canada (Information Commissioner) v. Canada (Prime Minister) [1992] F.C.J. No. 1054 [33], the evidence must demonstrate a probability of harm from disclosure. It will not be enough for the Public Body to describe the consequences of disclosure in a general way.

In the case before me, the Public Body has provided evidence of the harm which would transpire if any of the information in these records is disclosed. It is not mere conjecture. I accept the evidence that the witnesses to the investigation were assured that their statements would be kept confidential. Even if the Public Body were to sever the names of the witnesses, the information given would likely reveal their identity as the Applicants are aware of roles of the various employees and the dynamic among them. Therefore, I conclude that the Public Body has properly applied subsection 18(1)(d) to Records 26 to 40.
[PEI Order No. 07-001]

The final issue is with respect to the information in the Record that was supplied to the Society by the Applicant. The following Ontario case under the equivalent exemption provides authority with respect to information clearly within the Applicant's knowledge or that has been supplied to him or her:

Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323].

The absurd result principle has been applied where, for example:

- *the requester sought access to his or her own witness statement [Orders M-444, M-451]*
- *the requester was present when the information was provided to the institution [Orders M-444, P-1414]*
- *the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]*

[ON Order PO-2582]

Self-generated information already known to the Applicant should not be severed from the Record as to do so would lead to an absurd result.

FINDINGS:

1. The Record consists of personal information as defined by the *Act* about the Applicant, the Applicant's child and third parties;
2. The Applicant is the legal custodian of the Applicant's child and is entitled to access the Record containing that child's personal information;
3. The Children's Aid Society Inverness-Richmond is a public body under the *Act*;
4. The Record consists solely of a child welfare record and is a record to which the *Act* applies;
5. The Society is under a statutory duty not to release those parts of the Record that contain personal information about any third party;
6. Where, as here, the public body's decision at the outset is to not release any part of a record, no notice needs to be given to third parties. If the notice to the third parties is to obtain their consent, the public body must be, in good faith, considering the release of a record and must make it clear to the third parties that it was for the purpose of s. 20(4) of the *Act*;
7. The names of third parties, particularly confidential informants and collaterals in a child protection context, should not be included in the version of the Record provided to the Applicant;
8. The names of all employees or agents of the Society should not be severed as naming them is deemed not to be an unreasonable invasion of a third party's personal privacy pursuant to ss. 20(4)(e) of the *Act*;
9. While access in the child welfare context may only be allowed in well-defined situations, it will be permitted where appropriate under the *Act*. If the Legislative Assembly had intended it to be absolute that child protection files be unavailable under the *Act*, a section of the *Children and Family Services Act* would have been included in ss. 4A(2), the subsection that lists which enactments prevail over the *Act*. No part of the *Children and Family Services Act* is paramount to the *Freedom of Information and Protection of Privacy Act*;
10. The Society must look at each access request on its own merits. When this request was first made, the Society refused the entire Record to the Applicant. This overly restrictive approach, in a case involving personal information about the Applicant and his/her child and the Record made up largely of information provided by or known to the Applicant, is not appropriate;
11. The Review Officer recently issued a public report regarding this Society and very similar issues. The Society did not, however, have the benefit of that Review Report's Findings and Recommendations at the time of making its decision in this access request as its decision was made on October 26, 2007 and the Review Report was released on November 9, 2007.
12. The names withheld by the Society that were provided by the Applicant and appear in recorded conversations in the Record should not be severed out of the Record provided to the Applicant;
13. The Society, throughout the Review process, met its statutory duty to assist the Applicant;
14. The Applicant's real interest lay in understanding the process undertaken by the Society after the complaint regarding his/her child was made. The Applicant was advised that any complaint regarding maladministration of the child protection

process should be directed to the Ombudsman who is responsible for investigating claims of unfair process and/or maladministration;

15. The Society failed to meet the statutory test of "could reasonably be expected to harm" and thus make out the law enforcement exemption under s. 15 of the *Act*.

RECOMMENDATIONS:

1. The Society should release all information previously withheld under s. 15 of the *Act;*
2. The Society should release all information previously withheld under s. 20 of the *Act* with the exception of identifying information about third parties including confidential informants;
3. Any names or identifying information of employees of the Society, regardless of whether or not they are referred to as collateral contacts, should not be removed, in accordance with s. 20(4)(e) of the *Act*.

Respectfully,

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