REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-07-75

Report Release Date: September 1, 2009

Public Body: Department of Justice

Issues:

1. Whether s. 20 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"] requires the Department of Justice ["Justice"] to withhold the Record in full.
2. Whether it is necessary to consider any other exemptions.
3. If yes, whether the Review Officer will accept Justice's late claim of s. 18 of the *Act*.
4. If yes, whether s. 18 of the *Act* allows Justice to withhold the Record in full.

Record at Issue: Three handwritten letters from the Third Party to the Minister of Justice.

Summary: The Applicant made an Application for Access to a Record to the Department of Justice for handwritten correspondence from the Third Party to the Minister of Justice. Justice made a decision to withhold the Record in full because it contained personal information of the Third Party who did not consent to its release, was provided in confidence, and would result in an unreasonable invasion of the Third Party's privacy. In addition, Justice claimed a late exemption under s. 18 of the *Act*, which was accepted by the Review Office after Justice gave notice to the Applicant. Justice did not make out the test under s. 18 of the *Act* allowing it to refuse the Applicant access to his/her personal information.

Recommendations: The Review Officer recommended the following:

1. Justice re-affirm its decision to withhold all personal information about Third Parties in the Record under s. 20

of the *Act* by letter to the Applicant with a copy to the Review Officer;

2. Justice provide the Applicant with a severed copy of the Record, after it has been transcribed to avoid the release of a severed version of the Third Party's handwritten letters.

Key Words: confidential, discretion, discretionary exemption, duty to assist, handwritten, financial or other harm, in-camera, late exemption, litigation, mandatory exemption, mental or physical health, Minister of Justice, notice, opinions, personal information, private, Representations, safety, severed, transcribe, unreasonably interfere with the operations, views.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2, 3(1)(i), 4(2)(j), 5(1)(2), 7(1)(a)(2)(a), 8(3), 18, 20(1)(2), 37(1), 37(3); BC Freedom of Information and Protection of Privacy Act s. 22.*

Case Authorities Cited: *NS Review Reports FI-07-72, FI-07-59, FI-06-79; BC Orders F-08-19, F-07-24; ON Order MO-2371; Re: House [2000] N.S.J. No. 473 (S.C.).*

Other Cited: *Procedure for Claiming Additional Exemption Claims; BC's FOIPP Act Policy and Procedures Manual – Interpretation Note 1 (Section 22(1)), Interpretation Note 2 (Section 22(2)), Interpretation Note 1 (Section 19(1)(a); Ontario IPC Practices, Number 9.*

REVIEW REPORT FI-07-75

BACKGROUND

On October 22, 2007, the Applicant made an Application for Access to a Record to the Department of Justice ["Justice"], the Applicant requested:

> *. . . a copy of letters written to the Honorable Justice Minister [Name] by a [Third Party] of [Community], Nova Scotia. Such letters were in reference to Me [sic][Applicant] and a trial that was taking place in the Nova Scotia Law Courts in [location] at the time. We are aware that one letter written to the Minister was dated June 26, 2007. Further to this one other letter was received by the Minister from [Third Party] in 2006.*
>
> *I have enclosed a copy of an article printed in [Magazine] which has made reference to such letters. As well as a quote from the Minister of Justice in response to one of the letters.*
>
> *I am requesting at this time under the Freedom of Information Act subsection 6(1) a copy of all letters received by the Minister of Justice from [Third Party] in regards to me, [Applicant] and the trial that was before the Nova Scotia Law Courts.*

The Applicant had attached to the Form 1 and referred to in the cover letter, an article from a local magazine that had printed portions of the letters that are the Record, which is the subject of this Review. On October 26, 2007, Justice gave notice to the Third Party that an Application for Access to a Record had been received and that disclosure of the Record may invade his/her personal privacy. The Third Party responded indicating that s/he did not consent to disclosure of the Record because s/he felt that the consequences of disclosure may be serious as s/he does not even know the identity of the requester.

On November 21, 2007, Justice made a decision in response to the Application for Access to a Record as follows:

> *As a result of our review of the records and the representations received from the third parties, the decision has been made to deny access in full to these records. The reason for this denial is that the records contain the sensitive information of named individuals, the disclosure of which would constitute an unreasonable invasion of the privacy of these individuals pursuant to s.20(1) of the Act. An analysis also indicated that there was no way to sever the records in such a way that would allow the disclosure of information pertaining to yourself while protecting the privacy of other individuals.*

On December 11, 2007, the Applicant filed a Request for Review of Justice's the November 21, 2007 decision.

On February 29, 2008, Justice noted that it had not claimed s. 18 of the *Act* in its decision letter but after further consideration, a safety issue had been raised. On March 4, 2008, Justice corresponded with the Review Office and made reference to its reliance on s. 18. The Review Office requested details from Justice as to its reasons for claiming the s. 18(1)(a) exemption. These were provided on April 17, 2008. Justice indicated that it was relying on s. 18(1)(a) based on particular factors which were provided in confidence and have been reviewed in full as part of my formal Review. Justice appears to have relied on the same reasoning in not declaring its intentions with respect to s. 18 of the *Act* [health and safety] at the time of the initial decision.

On March 30, 2009, the Review Office corresponded with Justice, requested additional information and confirmed the following:

1. Cited the test for giving notice to an applicant of its claim to a late exemption and thereafter telling Justice to inform the Applicant of its reliance on s. 18.
2. Confirmed that during the process *prior* to the matter being referred to formal Review, Representations are not necessarily exchanged by the Review Office with the parties without consent.
3. Confirmed that any public body can request that Representations to the Review Officer be kept confidential or in-camera.
4. Requested further documentation of contacts with the Third Party.
5. Advised that when s. 20 of the *Act* requires personal information to be severed in a Record, this does not preclude the remainder of the Record from being released.

On April 9, 2009, Justice responded as follows:

1. Referred back to correspondence between the previous and the present Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator and the Review Office regarding its positions on s. 18, which remain the same.
2. Requested "that this file be moved along to the final stage."
3. Made the argument that s. 4(2)(j) of the *Act* prohibits the Review Officer from sharing Representations. "The Department does not wish its representations to be shared or quoted from in the course of the review."
4. The response did ***not***:

    a. Confirm that Justice planned to give notice to the Applicant regarding the s. 18 late exemption claimed;
    b. Request its Representations be considered in private or in-camera pursuant to s. 37(1) of the *Act*;
    c. Make any reference to or provide any evidence regarding its communications and contact with the Third Party as requested.

The Review Office requested Justice to inform the Applicant about the late exemption claimed on at least two other occasions. Justice explained at one point that the request was not clear to Justice as its focus had been on the applicability of the late exemption rather than the notice to the Applicant, though no request had been made

regarding s. 18 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"] as the Review Office already had the Representation from the former FOIPOP Administrator. The Review Office made it clear to Justice that a failure to inform the Applicant would likely result in the Review Officer not accepting the late exemption claim. Once that issue was clarified, Justice informed the Applicant of its reliance on the s. 18 discretionary exemption. Justice wrote to the Applicant on April 29, 2009, as follows:

> *Further to [Justice FOIPOP Administrator's] letter to you dated November 21, 2007, and at the request of the Review Office, I am notifying you that the Department is relying on Section 18(1)(a), in addition to Section 20, to withhold the records you requested. Section 18(1)(a) relates to the safety or mental and physical health of an individual.*

The file was not referred for Mediation.

ISSUES

Whether Justice appropriately applied the *Act* in its decision and in particular:

1. Whether s. 20 of the *Act* requires Justice to withhold the Record in full.
2. Whether it is necessary to consider any other exemptions.
3. If yes, whether the Review Officer will accept Justice's late claim of s. 18 of the *Act*.
4. If yes, whether s. 18 of the *Act* allows Justice to withhold the Record in full.

RECORD AT ISSUE

The Record at issue in this Review consists of three handwritten letters written by the Third Party to the Minister of Justice.

APPLICANT'S REPRESENATIONS

The Applicant was asked to provide Representations as part of the formal Review. S/he requested an extension of time to provide those Representations but none were received. In fact, there is no formal Representation from the Applicant - only copies of the Form 1 and Form 7, a letter in which the Applicant attempts to have his/her file expedited (which does not address the relevant issues), and notes to the file that describe in brief what was discussed during telephone conversations.

The Applicant indicated that s/he had been advised by an outside person that what was contained in his/her Representations could somehow be used against him/her. This is incorrect. All parties, including applicants, public bodies and third parties, are able to provide Representations on a confidential basis and indeed can ask for their Representations to be considered by the Review Officer in-camera pursuant to s. 37(1) of the *Act.* When this is done, the Review Officer asks for information to support the Review being conducted in private. If I am satisfied that the circumstances call for the

matter to be considered in private, the contents of the Representations are ***not*** included in the Review Report. No such request has been made by the Applicant in this case.

This presents a problem because while the onus is on the public body to demonstrate the exemption(s) were applied appropriately, there is a burden on an applicant to refute that position or to make a Representation where the onus shifts to him or her. For example, once the public body has demonstrated that the Record contains personal information of a third party that if released would be an unreasonable invasion of his/her privacy, the onus shifts to an applicant to refute that position. Representations also enable the Review Officer to learn first hand what the Applicant is and is not seeking. The failure to make a Representation in the formal Review will work to the disadvantage of the Applicant. For example, it was never made clear by the Applicant if s/he wanted both his/her own personal information and third party personal information. On a reading of the Form 1 it appears that the Applicant wanted copies of the three letters in full and no Representation was received to refute that reading of the original Application for Access to a Record.

PUBLIC BODY'S REPRESENTATIONS

Prior to considering the Justice's Representation, the issue of the disclosure of those Representations in a Review Report needs to be addressed. On July 2, 2009, Justice provided its final Representation as part of the formal Review process. In addition, the letter dated April 17, 2008, provided by Justice's previous FOIPOP Administrator, is also considered part of the Representations in the formal Review. Both of these letters were provided to the Review Officer on a confidential basis.

Justice argues that the effect of s. 4(2)(j) of the *Act* was to prohibit the Review Officer from disclosing its Representations with the Applicant. That section provides:

> *4(1) This Act applies to all records in the custody or under the control of a public body, including court administration records.*
>
> *(2) Notwithstanding subsection (1),* ***this Act does not apply to***
>
> *(b) material that is a matter of public record;. . .*
> *(j)* ***a record of each representation made on behalf of a public body to the Review Officer in the course of a review pursuant to Section 32 and all material prepared for the purpose of making the representation.***
> ***[Emphasis added]***

As a point of clarification, this provision does not apply to the Review process. It is intended to put Representations provided by public bodies beyond the reach of the *Act* and thereby make them unavailable to any potential applicant. This means that it is impossible for anyone to get access to Representations submitted by public bodies to the Review Officer by filing an Application for Access to a Record under the *Act*. The statute protects these Representations from being made public as a result of an Application for Access to a Record. What it does not do, however, is govern the Review

Office process in any way whatsoever as to how those Representations are used by the Review Officer in the course the Review in which they are submitted. The process at the Review Office is governed by the interpretation of the requirements of the *Act* as interpreted by the Review Officer.

Section 37 of the *Act* governs the process for a formal Review. It provides, in part, as follows:

> *37(3)* ***The Review Officer may decide***
>
> *(a) whether the representations are to be made orally or in writing;*
> *(b)* ***whether a person is entitled*** *to be present during a review or* ***to have access to or comment on representations made to the Review Officer by any other person.***
> ***[Emphasis added]***

Subsection 4(2) has no relevance to Representations given to the Review Officer during the formal Review and it is solely within my discretion how to make use of those Representations in the course of the formal Review.

Public bodies and other parties, however, may want to be able to provide information to the Review Officer on a confidential basis, in appropriate circumstances. That can be achieved by relying on s. 37(1) of the *Act*, which provides as follows:

> *37(1) The Review Officer may conduct a review in private.*

Justice has requested that its Representations be kept confidential. Despite having tried to make the argument for that under the wrong section of the statute [s. 4(2)], I am convinced that Justice has made a case for me to exercise my discretion under s. 37(1) of the *Act* to consider its Representations in private or in-camera.

DISCUSSION:

The Applicant's right to access information under the *Act* is stated in the purpose section, which provides:

> *2 The purpose of this Act is*
>
> ***(a) to ensure that public bodies are fully accountable to the public by***
>
> *(i) giving the public a right of access to records,*
> ***(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,***
> *(iii) specifying limited exceptions to the rights of access,*
> *(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and*

(v) providing for an independent review of decisions made pursuant to this Act; and

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

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

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

Justice originally refused the request on the basis of the fact that the Record contained personal information of a third party. Personal information is defined in s. 3 of the *Act* as follows:

3 (1)(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]

On November 14, 2007, Justice gave notice to the Third Party referred to in the Record. "Third party" is defined in the *Act* as follows:

3(1) In this Act

(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;

On November 21, 2007 Justice confirmed in writing with the Third Party that s/he did not consent to the release of the Record as it contained his/her personal information.

PERSONAL INFORMATION

The *Act* provides an illustrative, non-exhaustive list of what is considered personal information. Justice initially relied solely on s. 20 of the *Act,* specifically s. 20(1), 20(2)(e) and 20(2)(f), which read as follows:

> *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.*
>
> ***[Emphasis added]***

In all Canadian jurisdictions, oversight bodies have encouraged public bodies to give a broad and liberal interpretation to the definition of "personal information" and not to restrict those words to the examples listed in the statutes. Said simply, to qualify as personal information, it is reasonable to expect that an individual will be identified if the information is disclosed.

In deciding whether or not the exemption applies, a public body must first establish that it is personal information. Once it is established that it is personal information about an identifiable person, the public body must work its way through s. 20 of the *Act* as outlined by the Supreme Court of Nova Scotia in the *Re House* case, in

which Justice Moir discussed the process to be followed in assessing whether personal information should be released. Justice Moir stated as follows:

> *. . . 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.) at para. 8.*

The phrase in s. 20 of the *Act* "shall refuse to disclose" is to read that the public body must refuse to disclose information. That means that subsection 20(1) is a mandatory exception to the general public right of access if the public body determines that disclosure would be an unreasonable invasion of personal privacy. Where requested information falls under this exception, the head of the public body or the FOIPOP Administrator as his or her delegate has no discretion and must not release the information unless required to do so in the public interest, under the public interest override in s. 31 of the *Act*. No Representation has been received with respect to the public interest override and it is, therefore, not applicable in this case.

I turn now to the issue of whether or not the disclosure "would be an unreasonable invasion of a third party's personal privacy." The BC *Freedom of Information and Protection of Privacy Act* is almost identical to the Nova Scotia *Act,* with slightly different numbering.

> *This term* [unreasonable invasion] *is not defined within the Act, however 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 Manual, Interpretation Note 1 (Section 22(1)]*

The BC Manual discusses the personal privacy exemption and also provides guidance on applying the harm test (found in subsection 20(2) of the Nova Scotia *Act*). I have edited the quote below to reflect the references to Nova Scotia's *Act*, which can be identified by parentheses. The manual states:

> *This subsection requires the head of a public body to consider not only the circumstances set out in subsection* [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* [20(2)(a) to (d)] *support the release of personal information, where it is not an unreasonable invasion of a third party's personal privacy. Paragraphs* [20(2)(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 Manual, Interpretation Note 2 (Section 22(2)]*

The Ontario Office of the Information and Privacy Commissioner in its *IPC Practices, Number 9*, provides the following recommended approach for responding to requests for personal information:

> *. . . the institution has the discretion to choose whether to release the records after considering any applicable exemptions and weighing the requester's right of access against any other individual's right to the protection of his or her privacy.*

The Record at issue includes the following kinds of information, some of which is personal information:

- Date stamp
- To whom the letter(s) were addressed
- Date(s) of the letter(s)
- Background information, including dates
- Facts
- Narrative
- Names of Public Servants
- Opinions and views of a third party
- Opinions and views about the Applicant

- Name, address and phone number of a third party
- Name of a business person
- Feelings of a third party
- Age of a third party
- Personal information making reference to the Applicant's name, employment and location

Clearly there are two aspects that comprise this Record – personal information about the Applicant and personal information about Third Parties. The bulk of the information in the Record is opinions and views of the Third Party about the Justice system, which is his/her personal information. There are minimal references to the Applicant's personal information. All of the information in the Record has been supplied by the Third Party. This case is distinct from a former Review Report from this Office where I recommended the public body release a severed Record because the Applicant in that case was seeking a copy of a record largely containing personal information s/he had supplied to the public body about his or her child. *[See FI-07-72]*

Section 20 is a mandatory exemption and requires the public body to withhold all information that falls within the definition of personal information of an identifiable individual whose privacy would be compromised by its release. The bulk of the personal information in the Record is that of Third Parties and, primarily, the Third Party's personal views or opinions about the Justice system – which if released would be an unreasonable invasion of his/her privacy and therefore must be withheld.

The subject matter of the Record is a mixture of the Third Party's personal views and opinions about the Justice system in Nova Scotia, the Third Party's opinions about the Applicant, and personal information about the Applicant. An Order from British Columbia had a matter that considered a Record containing personal information about two people. The Order stated:

> *[81] I accept ICBC's severing decisions in the statements except for two sentences. For the severing I accept, I have considered each step in the application of s. 22, and find no error in ICBC's decision. In particular, most of the severed information is about the former acquaintance, not the applicant, and has little to do with the circumstances she described about the alleged dishonest behaviour. Two sentences (one preceding each of the two I will order disclosed) could arguably be said to also be about the applicant.* ***I find after careful examination that they are not about the applicant, and, even if they are, considering the presumption raised by s. 22(3)(b) and all relevant circumstances as discussed below, I agree with ICBC that it would be an unreasonable invasion of the former acquaintance's personal privacy to disclose them.***
> ***[Emphasis added]***
> *BC Order F-08-19*

In a case from Ontario, which involved handwritten records that contained personal information of an applicant and a third party, the Commissioner acknowledged

that the public body had disclosed portions of the record containing the applicant's personal information but was not entitled to the remainder, the personal information of a third party.

> *I have closely examined the inspection report at issue and find that the withheld portions contain the name, address, telephone number and other information that could identify the affected party. The record also contains the appellant's personal information.*
>
> *In particular, I find that the withheld portions of the record at issue are the personal information of the affected party only. All of the appellant's personal information in the record has been disclosed to him. As the record contains the personal information of both the affected party and the appellant, I will consider whether the affected party's personal information is exempt under section 38(b) of the Act.*
> *[Ontario Order MO-2371]*

Justice had evidence before it that formed a reasonable basis for its decision to apply the mandatory exemption under s. 20 of the *Act*. In turn, I find, based on the contents of the Record, it is reasonable to assume it was provided in confidence. In addition, there is some evidence that the Third Parties could be exposed to financial or other harm if the Record were to be released to the Applicant. Because the burden of proof is with the Applicant pursuant to s. 45(2) of the *Act*, of which s/he was made aware by the Review Office on many occasions, and s/he has not provided any evidence to the contrary, the exemption is applicable: Justice was required to withhold third party personal information under s. 20 of the *Act*.

Justice has not provided sufficient evidence to show that the Applicant should not have access to the remainder of the Record – his/her own personal information and non-personal information.

With respect to the remaining portion of the Record, the issue is whether that information can reasonably be severed.

> *5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act**, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.***
> ***[Emphasis added]***

I believe the Record can be severed to remove reference to all third party personal information to permit the Applicant access to the remainder. While the majority of the Record is the Third Party's opinions and views about the Justice system in Nova Scotia,

there are some references to the Applicant's personal information to which s/he is entitled under the statute.

LATE EXEMPTION

Justice claimed a late exemption on March 3, 2008. This was confirmed by letter from the Review Office to Justice on March 17, 2008 that requested additional information to support its claim to s. 18 of the *Act.* Justice provided its rationale for that claim in a Representation received April 17, 2008. After repeated requests by the Review Office, Justice advised the Applicant of the late exemption claimed on April 29, 2009.

In its initial decision to the Applicant dated November 21, 2007, Justice relied solely on s. 20 of the *Act* and clearly met its obligations with respect to its duty to assist by providing reference to the exemption(s) relied on and reasons for its decision. Justice did not make any reference to s. 18 of the *Act* or provide any reasons for its reliance thereon.

The *Act* stipulates how a public body is intended to respond in a particular way to an Application for Access to a Record:

> *7(1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall*
>
> > *(a)make every reasonable effort to assist the applicant and* ***to respond without delay to the applicant openly, accurately and completely****. . .*
>
> *(2) The head of the public body shall respond in writing to the applicant* ***within thirty days*** *after the application is received. . .*
>
> > *(a)(ii) where access to the record or to part of the record is refused, the* ***reasons for the refusal and the provision of this Act on which the refusal is based;***
>
> ***[Emphasis added]***

The Review Office issued a *Procedure for Claiming Additional Exemption Claims* on September 30, 2004 as a best practice. It provides as follows:

> *After the public body has been notified by the Review Office that a Request for Review has been received, the Public Body may claim additional exemption sections* ***within 15 days of the review notification.***
>
> ***The Public body must give written notice to the Applicant*** *and to the Review Office of any additional exemption sections claimed. Any additional exemption sections claimed outside the 15 day period* ***may not be considered*** *during the review process.*
>
> ***[Emphasis added]***

On December 18, 2007, the Review Office gave notice to Justice that the Request for Review had been received from the Applicant. It was not until March 4, 2008 in an email that Justice indicated its intention to rely on the s. 18 exemption.

The result is that Justice advised the Review Office of the intention to claim a late exemption 104 days after its decision in response to the Application for Access to a Record was issued and 78 days after receiving notification of the Request for a Review, 63 days later than the Procedure anticipates.

There was a lengthy exchange between the Review Office and Justice with respect to the need to give notice to the Applicant and the Review Office if it intends to claim additional exemption sections.

There was significant delay on the part of Justice in advising the Review Office of its intention to rely on s. 18 of the *Act.* There was further delay in making the Applicant aware but s/he was advised by Justice and had the opportunity to respond. This is distinct from a former Review from this Office that stated:

> *Community Services argues that it is appropriate to be able to rely on s. 18(1)(a) as a late exemption based on its efforts to ensure accountability and transparency. This reasoning is illogical. Transparency means greater accessibility not less. Adding on another exemption to try to justify the severing of the Record over 12 months after its original decision letter to the Applicant is totally unacceptable. Community Services ought to have claimed this late exemption within 15 days of being notified by the Review Office that a Form 7 had been filed, which was on October 18, 2007.*
>
> *The request to consider the s. 18(1)(a) exemption is also rejected because Community Services has never put the Applicant on notice that it intended to make this late exemption claim. The Late Exemption Policy specifically provides that the public body must give written notice to the Applicant. The Applicant has never had an opportunity to respond to it. Quite apart from the Policy, fairness would dictate the Applicant having a chance to respond to the late exemption. In any event, Community Services has provided no details on its applicability or to which portion of the Record it applies so there would be no value added in accepting it as outlined in its submission to the Review Officer.*
> *[FI-07-59]*

While there was delay in giving the Applicant notice, Justice's approach was reasonable in the circumstances. Despite the requirements of s. 7(1)(a) of the *Act* that requires a public body's decision to "open, accurate and complete", it will be appropriate in certain circumstances for a public body to claim a late exemption, as Justice has done in this case.

> *There will be circumstances, however, where it becomes necessary for a public body to make an additional exemption claim(s). In this case, a public body must remember to give notice to the Applicant as well as the Review Office and to do so*

at the earliest possible time. Applicants will be given the opportunity to make additional submissions in a formal review in response to these additional claims, where they choose to do so.

Public bodies must, however, be cognizant of the fact that the Review Officer may, under the policy cited above, elect not to consider exemptions claimed late and in doing so would consider a public body's failure to give notice to an applicant as being highly relevant. Every effort must be made under the duty to assist to locate all records responsive to the request for access to information and to claim any and all exemptions upon which the public body wants to rely at the outset. This complete and accurate response should not be prompted by an Applicant's Request for a Review. When an exemption is claimed late, public bodies should provide the Review Officer and the Applicant with an explanation as to the reasons.
[FI-06-79]

Despite the delay in advising the Applicant, Justice did make a case as to the applicability in its Representation to the Review Office dated April 17, 2008, early on in the Review process. Ultimately the Applicant was advised on April 29, 2009, about the late exemption. S/he chose not to make any final Representations in the formal Review. I am satisfied that after the Applicant received notice, had s/he considered that s/he suffered a prejudice by virtue of the fact that Justice had claimed a late exemption, s/he would have made that case, which s/he did not. As a result I am prepared to accept the late exemption claimed by Justice. I will consider its applicability to the Record below.

SECTION 18

In this Review, I have found that Justice correctly withheld third party personal information under s. 20 of the *Act* but that the Applicant is entitled to his/her personal information and the information that is not considered personal information. I also noted that the late exemption claim by Justice is accepted for consideration of its applicability to the remainder of the Record. Turning now to the second exemption claimed, s. 18, the issue is whether or not it can be used to withhold the personal information of the Applicant contained in the Record.

*18(1) The head of a public body may refuse to disclose to an applicant information, **including personal information about the applicant**, if the disclosure could reasonably be expected to*

*(a**) threaten anyone else's safety or mental or physical health. . .***

(2) The head of a public body may refuse to disclose to an applicant personal information about the applicant if the disclosure could reasonably be expected to result in immediate and grave harm to the applicant's safety or mental or physical health.
[Emphasis added]

Justice provided its Representations regarding s. 18 of the *Act* on a confidential basis and I accepted them in private. In considering the evidence provided by Justice I am aware that the test is that there needs to be a ***clear connection established*** on the facts *between the reasonable expectation of a threat to safety or mental or physical health and the disclosure of the information.*

The burden rests with Justice to demonstrate this clear connection.

[6] This section has been considered in numerous orders. The central issue in these cases is whether a rational connection has been established between disclosure of the disputed information and a reasonable expectation of a threat to anyone's safety or mental or physical health.

[7] In Order 00-28, Commissioner Loukidelis discussed the burden that falls on a public body seeking to make this connection under s. 19(1):

> *As I have said in previous orders, a public body is entitled to, and should, act with deliberation and care in assessing - based on the evidence available to it - whether a reasonable expectation of harm exists as contemplated by the section. In an inquiry, a public body must provide evidence the clarity and cogency of which is commensurate with a reasonable person's expectation that disclosure of the information could threaten the safety, or mental or physical health, of anyone else. In determining whether the objective test created by s. 19(1)(a) has been met, evidence of speculative harm will not suffice. The threshold of whether disclosure could reasonably be expected to result in the harm identified in s. 19(1)(a)* ***calls for the establishment of a rational connection between the feared harm and disclosure of the specific information in dispute.***
>
> *It is not necessary to establish certainty of harm or a specific degree of probability of harm. The probability of the harm occurring is relevant to assessing whether there is a reasonable expectation of harm, but mathematical likelihood is not decisive where other contextual factors are at work. Section 19(1)(a), specifically, is aimed at protecting the health and safety of others. This consideration focuses on the reasonableness of an expectation of any threat to mental or physical health, or to safety, and not on mathematically or otherwise articulated probabilities of harm.*

[Emphasis added]
[BC Order F07-24]

I am guided in my consideration of s. 18 of the *Act* from excerpts from the BC's *FOIPP Act* Policy and Procedures Manual. British Columbia's statute is substantially similar to Nova Scotia's *Act*:

The standard of proof to be applied by the head of the public body is a balance of probabilities that the potential violence or harm will result. The head of the public body is not required to prove that the harm will result.

Threaten anyone else's safety or mental or physical health

*"**Threaten**" means to create the possibility or risk of harm, or jeopardize an individual's safety or mental or physical well-being.*
The possibility or risk of harm is a low threshold that allows this exception to apply if there is a reasonable expectation that disclosure of the information could create a risk of harm to an individual or group of individuals.

*"**Safety**" means the condition of being safe; free from danger or risks [OED].*

*"**Mental health**" means the ability of a person's mind to function in its normal state. Determination of the effect of a release of information on a person's mental health must, where practicable, be based on a subjective evaluation made on a case by case basis. It may be helpful for the head to obtain the assistance of an expert (e.g., a psychiatrist) when making this determination.*

*"**Physical health**" means the well being of an individual's physical body. Determination of the effect of a release of information on an individual's physical health must consider the current or normal state of health of persons who may be affected by the release of information, as well as the decline in health that is expected to occur if the information is disclosed to the applicant. It may be helpful for the head to obtain the assistance of an expert (e.g., a physician) when making this determination.*
The safety of another person would be threatened if information were disclosed to an applicant that could jeopardize the other person's safety.
The mental or physical health of another person would be threatened if information were disclosed to an applicant that would cause severe stress to either the person's mind or body.

Examples

- *An individual's safety, or the safety of residents in an area, may be threatened if information about the location of a transition house is disclosed.*
- *Another individual's mental and physical health might be threatened if information were disclosed to an applicant which could reasonably be expected, if shown to the other person by the applicant, to cause the other person to become suicidal.*
- Disclosure of the identity of a whistle blower who has expressed opinions about wrongdoing during an audit may expose the individual to harm.

[BC FOIPP Act Policy and Procedures Manual, Interpretation Note 1 (Section 19(1)(a)]

I am not satisfied based on the information provided by Justice that the s. 18 test can be met; therefore there is no need for a discussion on how Justice exercised its discretion to refuse access. Suffice to say that difficulties for the parties in the situation referred to in the Record does not equate with the consequences required by s. 18 of the *Act* as a result of the release of the Record. The release will be restricted to the Applicant's personal information. The bulk of the Record will not be released as it is not about the Applicant. What the Applicant intends to do with the information is irrelevant to a determination under s. 18 of the *Act.* The Third Party may never be aware that the Applicant received his/her personal information and thus Justice has failed to make the connection between the release of the severed Record and any harm to an individual. In fact, it is just as probable that upon seeing what personal information is contained in the Record, the Applicant's concerns will be dissuaded.

With respect to the format to produce the severed Record, in order to maximize the protection of the privacy of the Third Party, Justice should consider creating a Record by transcribing the handwritten letters into a typed version. Typing three letters would not unreasonably interfere with the operations of Justice.

8(3) The head of a public body shall create a record for an applicant if

> *(a) the record can be created from a machine-readable record in the custody or under the control of the public body using its normal computer hardware and software and technical expertise; and*
> (b) ***creating the record would not unreasonably interfere with the operations of the public body.***

[Emphasis added]

Subsection 8(3), if given a liberal interpretation, could contemplate transcribing written to typed format. If that is not the case, the duty to assist in s. 7 of the *Act* contemplates Justice making such a reasonable effort to assist the Applicant.

PRACTICE NOTE RE REVIEW PROCESS

Two final notes regarding matters that surfaced during this Review about process: First, Justice requested that "this file be moved along to the final stage" while then in the Case Review Analysis and Investigation stages. The Review Officer establishes the process of Review at the Office and neither public bodies nor applicants can dictate to the Review Office how that process is to unfold at any stage of the Review.

Second, Justice indicated that it was not in contact with the Applicant because its position was that once the Form 7 had been filed and a Review commenced, it was inappropriate for Justice to be in touch with the Applicant. I am not certain where this idea came from but it is not the position of the Review Officer that this is necessary or

even appropriate. The following are indicators that the Review Officer recognizes that public bodies may continue to be in touch with applicants, as they deem appropriate:

1. There are no statutory timelines on the duty to assist.
2. The first correspondence that a public body receives from the Review Office after a Form 7 has been filed advises public bodies to "please ensure that all subsequent correspondence between yourself, the Applicant and any affected third parties regarding this matter be copied to the Review Office."
3. Some matters that arise during the Review process require a public body to give notice to an applicant, such as when a late exemption is claimed.
4. Those working within government and applicants often belong to the same communities and no practice or policy of the Review Office should be in place that discourages people from respecting and communicating with each other.

FINDINGS:

Based on the evidence before me, I make the following findings:

1. The Record contains the Applicant's personal information as defined by the *Act* and, in particular, reference to his/her name as an identifiable person.
2. The Record contains third party personal information as defined by the *Act* and, in particular, the Third Party's name, address and personal views and opinions about the Nova Scotia Justice system.
3. There are three aspects that comprise this Record – personal information about the Applicant, personal information about Third Parties and other non-personal information.
4. There is some evidence that the Record was provided to the Minister of Justice by the Third Party on a confidential basis.
5. Justice is required by s. 20 of the *Act*, a mandatory exemption, to withhold any portion of the Record the release of which would be an unreasonable invasion of a third party's personal privacy.
6. Justice's analysis of factors to consider under s. 20(1) of the *Act* listed in s. 20(2) of the *Act* were appropriately applied including that the personal information had been supplied in confidence by one of the Third Parties and that disclosure would unfairly expose another person or other persons to financial or other harm.
7. The Third Party who received notice from Justice did not consent to the release of the Record.
8. The Applicant did not make any Representations in the Review process despite being advised of the burden on him/her to do so to refute the claims advanced by Justice.
9. The late exemption claimed by Justice under s. 18 of the *Act,* about which the Applicant was given notice, is accepted by the Review Officer.
10. Justice has not made out the test under s. 18 of the *Act* to exercise its discretion to refuse the Applicant access to his/her personal information.
11. Exemptions should not be applied using the blanket approach. Justice should have applied s. 18 to the portion of the record that remained after s. 20 had been

applied. Section 20 is a mandatory exemption and the ability to withhold third party personal information was available under that exemption. Discretionary exemptions should be restricted to what normally would be released.

12. Pursuant to s. 8(3) or s. 7(1) of the *Act,* the Record should be transcribed in order to maximize protection of third party privacy and thereafter severed for release to the Applicant.

RECOMMENDATIONS:

I recommend the following to Justice:

1. Justice re-affirm its decision to withhold all personal information about Third Parties in the Record under s. 20 of the *Act* by letter to the Applicant with a copy to the Review Officer;
2. Justice provide the Applicant with a severed copy of the Record, after it has been transcribed to avoid the release of a severed version of the Third Party's handwritten letters.

Respectfully submitted,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer