REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-08-108

Report Release Date: March 7, 2011

Public Body: Mount Saint Vincent University

Issues: Whether Mount Saint Vincent University ["the Mount"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether the Record contains the personal information of the Applicant.
2. If yes, whether the personal information of the Applicant was supplied by third parties in confidence. If yes, whether a summary under s. 20(5) is possible.
3. Whether the Record contains third party personal information.
4. Whether s. 18 of the *Act* allows the Mount to withhold the Record in full.
5. Whether the Mount properly exercised its discretion in applying s. 18 of the *Act* to the Record.
6. Whether the Mount applied the exemptions in a blanket manner or whether severing could have been applied to the responsive Record in accordance with s. 5(2) of the *Act*.
7. Whether the Mount met its statutory duty to assist the Applicant under s. 7 of the *Act*.

Record at Issue

Pursuant to s. 38 of the *Act*, the Mount has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

The Record consists of two pages. Both are responsive to the Application for Access to a Record filed by the Applicant and composed mostly of the Applicant's personal information in a security incident report.

Summary: An Applicant filed a Request for Review of the Mount's decision regarding an Application for Access to a Record for any incident reports that would explain why s/he had been banned from the campus at the Mount.

Findings: The Review Officer made the following findings:

1. The Record contains the Applicant's personal information, to which s/he is *prima facie* entitled under the *Act*.
2. Section 15 of the *Act* does not apply to this Record as there is no evidence of harm to investigative techniques, and the Mount correctly withdrew its reliance on an exemption under s. 15 during the Review process.
3. Public bodies should address any mandatory exemption in their Representations to the Review Office. However, even if not claimed, it is incumbent on the Review Officer to consider a mandatory exemption's applicability to the Record. In this case, the mandatory exemption is s. 20.
4. Subsection 20(1) of the *Act* does apply in this case, but the Applicant made it clear s/he did not want access to third party information.
5. There is no evidence the Applicant's personal information was supplied in confidence.
6. The Record can easily be severed to remove any third party personal information.
7. The FOIPOP Administrator's decision is entirely subjective, speculative and assumes an unarticulated connection between the release of the Record and harm to a third party.
8. The s. 18 exemption does not apply, which makes it unnecessary to consider the exercise of discretion.
9. Had s. 18 been found to apply, it should not have been applied in a blanket manner to the entire Record. All records must be reviewed line by line; only the information subject to the exemption should be withheld.
10. I find the Mount has breached its statutory duty under s. 7 of the *Act* to assist the Applicant, the following being the most egregious examples:

    a. Advising the Applicant in its original decision that the *Act* did not apply to his/her Application for Access to a Record;
    b. Failing to advise the Applicant of his/her right to file a Request for Review of its decision to refuse him/her access to the entire Record;
    c. Failing to provide the Applicant reasons for how the exemption[s] applied to the Record;
    d. Failing to respond in a timely fashion throughout the Review process causing inordinate delay;

e. Recanting on making a new decision and failing to release the severed Record to the Applicant;
f. Applying a subjective test to the application of the s. 18 exemption without any evidentiary basis.

Recommendations: I want to premise my Recommendations with the following. I am concerned that this case may show a lack of commitment to FOIPOP at the Mount. This is not just about the person responsible as the delegated authority under the *Act*. Some of the findings in this Review point to serious problems, which can only be resolved by the Mount's leadership. When applicants under the legislation are advised the *Act* does not apply while at the same time not being told they have a right to file a Request for Review, this is very problematic. The commitment to the right to access information must come from the university as a matter of principle and it must support the important work of the FOIPOP Administrator in practice.

The Review Officer made the following recommendations to the Mount:

1. Release the complete Record to the Applicant with the personal information of all third parties severed.
2. Support the FOIPOP Administrator's office in its efforts to participate in further FOIPOP training through the office of the Chief Information Access and Privacy Officer.

Key Words: apology, banned, blanket, burden, campus, confidential, delay, discretion, duty to assist, harm, incident report, investigation, investigative techniques, onus, personal information, reasonable expectation, security.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2(a)(ii), 3(1), 7, 5(2), 15(1), 18, 20, 38.*

Case Authorities Cited: *Nova Scotia Review Reports FI-08-23, FI-09-40, FI-07-75, FI-06-79, FI-03-50, FI-10-26, FI-02-81; BC Order 325-1999; Chesal v. Attorney General of Nova Scotia 2003 NSCA 124.*

Other Cited: *Mount Saint Vincent University website www.msvu.ca*

REVIEW REPORT FI-08-108

BACKGROUND

On September 10**,** 2008 the Applicant filed a Form 1 Application for Access to a Record to the Mount Saint Vincent University ["the Mount"] which requested the following:

> *On April 5, 2008 I attended an event at the MSVU Art Gallery. I was asked to leave and not return. I was not given any reason for why I was being asked to leave. I made subsequent inquiries through MSVU campus security and I was told only that the reason for the request to leave did not relate to anything that happened on the evening of April 5/08. I believe [name of employee] or [name of employee] may have the records or information about me. I believe I have been barred from the entire MSVU campus. I am looking for incident reports explaining why I was ordered off MSVU property.*

On October 21**,** 2008, the Mount provided the Applicant with a decision in response to his/her Application for Access to a Record, which provided as follows:

> *I am in receipt of your September 10, 2008 request for information. You made the following request: [above].*
>
> *Mount Saint Vincent University ("MSVU") will not disclose the information you have requested on the following basis:*
>
> *1. The Freedom of Information and Protection of Privacy Act ("FOIPOP") has no application to the information you have requested.*
>
> *Even if FOIPOP has application, MSVU says:*
>
> *2. The disclosure of the requested information can reasonably be expected to threaten the safety or mental or physical health of individuals and interfere with public safety.*
>
> *Section 18(1) of FOIPOP Provides:*
>
> *(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; or*
> *(b) interfere with public safety.*
>
> *3. The disclosure of the information could reasonably be expected to endanger the life or physical safety of individuals.*
>
> *Further, Section 15(1) of FOIPOP provides:*

(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to . . .

c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement . . .

For these reasons, the information will not be disclosed.

On December 5, 2008 (received December 17, 2008), the Applicant's agent filed a Form 7 Request for Review, with an attached letter, which will be discussed in the Applicant's Representations below.

On December 9, 2008 the Review Office informed the Mount of the Review and addressed the fact that the responsive Record would be subject to the *Freedom of Information and Protection of Privacy Act* ["*Act*"]. In its response on January 7, 2009, the Mount identified this as a result of poor wording, which lead to the confusion, not the belief that the *Act* did not apply.

On October 14, 2009, the Review Office wrote to the Mount to advise that its decision letter had failed to notify the Applicant of his/her right to file a Request for Review of its decision, that it had neglected to provide reasons for its decision and requested Representations from the Mount by October 29, 2009 to explain how it exercised its discretion.

On November 18, 2009, the Mount responded, the details of which are included in the Public Body's Representations below.

In response to research provided by the Review Office, on January 22, 2010, the Mount provided a new decision to the Review Office in response to the Application for Access to a Record, which stated:

Thank you for your letter of November 26, 2009. Given that the statute of limitations has passed on the incident, and that the [third party] involved in the original incident is no longer [connected to] the University, we are willing to submit a severed copy of the records (please see attached).

On April 12, 2010, the Mount provided another decision to the Review Office, which provided as follows:

First I would like to apologize for my extreme tardiness in responding to you on this matter. It is my lack of experience and not my lack of respect for the process that accounts for this tardiness. My letter to you dated January 22nd, 2010 indicated that we would be willing to submit a severed copy of our documents. This decision was based, in part, on the feedback and examples received from your office in a letter dated November 26, 2009 regarding the articles in question. However as I was preparing to sever the documents, the possible risk associated with their release kept raising red flags with me. I have given this further consideration and have had a change of mind on the matter. Despite that the statute of limitations has passed and that the people affected are no

longer [connected to] the Mount, I believe that there is a risk associated with releasing the documents to [the Applicant] that I am unwilling to take.

On January 5, 2011, the Review Office asked the Mount to reconsider disclosing a copy of the Record as severed previously, by verbal agreement. On January 18, 2011, the Mount declined this and requested the file proceed to formal Review.

In the end, these attempts by the Review Office to resolve the matter were unsuccessful. The Mount's FOIPOP Administrator twice stated she would issue a new decision to the applicant and release a version of the severed Record she had prepared and then later recanted her position stating on both occasions that she believes there is a risk associated with releasing the documents. No evidence was provided by the Mount when it changed its position.

The Mount was asked to provide its final Representation to the Review Office on or before February 18, 2011. The Review Office had asked the Mount to provide detailed responses in its Representation to matters that had arisen during the Review but which it had not previously sufficiently addressed. An email was received from the Mount on February 21, 2011. The last Representation received did not comply with this request satisfactorily. The Representation provided was polite, short, cryptic and not responsive. This is unfortunate but consistent with the pattern of how the Mount has treated the Review Office and the Applicant throughout this entire process.

Mediation was not attempted.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, the Mount has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

The Record consists of two pages. Both are responsive to the Application for Access to a Record filed by the Applicant and composed mostly of the Applicant's personal information in a security incident report.

APPLICANT'S REPRESENTATIONS

On December 5, 2008, the Applicant's agent *[Form 4 Consent to Use Personal Information signed by Applicant for his/her agent]* submitted a Representation, which provided, in part, as follows:

I am writing to assist [name of Applicant] in making a Request for Review under the Freedom of Information and Protection of Privacy Act (FOIPOP). [S/he] is requesting a review of a decision by the Freedom of Information Officer at Mount Saint Vincent University (MSVU), refusing disclosure of information supporting a decision to order [him/her] not to return to Mount Saint Vincent University. I am enclosing [his/her] original request for information, the response from the Mount, and copies of some

correspondence which preceded the request for information, which may help to clarify the nature of the request.

MSVU has refused [the Applicant's] request on three grounds. The first is on the basis that the FOIPOP has no application to the information requested. As I read the appropriate sections, MSVU seems clearly to fall within the definitions of "public body" and "local public body" and would therefore be subject to the provisions of the Act.

The second and third grounds for refusal seems to suggest that disclosure of the information might reasonably be expected to interfere with the safety of individuals, or harm the effectiveness of investigative techniques. While I am sure this is often a concern in requests for information, I believe it is also possible to present or edit information in a manner that will both inform [the Applicant] about what [s/he] was alleged to have done to warrant removal from the property, and yet protect the privacy of other parties or shield the security of investigative techniques.

There were no further Representations received from the Applicant or his/her agent in response to Investigation Summary. The Applicant has a straightforward and reasonable request to his/her personal information that has been systematically hindered by the Mount. There has been no change in the Applicant's position from the time of his/her original request. As his/her Application for Access to a Record indicated, the Applicant is simply looking for the incident report that explains why s/he was banned from the Mount's campus. The Applicant has made it patently clear s/he is not requesting access to any third party personal information.

PUBLIC BODY'S REPRESENTATIONS

On November 18, 2009, the Mount provided a Representation to the Review Office, which can be summarized as follows:

1. Its decision letter to applicants would be amended to provide reasons for its decision and to make reference to an applicant's right to file a Request for Review;
2. After being informed that for s. 15 of the *Act* to apply there had to be evidence that release of a record would compromise the effectiveness of an investigation technique, it withdrew its reliance on s. 15;
3. It considered its duty is to protect the privacy of its university constituents and therefore it erred on the side of caution by refusing the whole Record including the Applicant's personal information;
4. It made an offer to the Review Office that if partial access was, in our opinion, a possibility, the Mount was willing to meet to see how that could be undertaken.

Subsequently, the Mount worked with the Review Office on two occasions to issue a new decision to the Applicant including a severed copy of the Record that would satisfy the Applicant's access to information request, but on both occasions recanted. The first proposal, on January 22, 2010 was in writing and stated that the Mount was prepared to issue a new decision because the statute of limitations had passed and the third party involved was no longer connected to the university. There was no action on this new decision and it was never provided to the Applicant. Notwithstanding many contacts to the Mount by the Review Office, it was not until April 12, 2010 the Mount reneged and confirmed in writing that it was withdrawing its

proposal. This was during the Case Review Analysis stage. In August 2010, during the Investigation phase of the Review, the FOIPOP Administrator once again indicated a willingness to reconsider her decision but not until an email dated January 19, 2011 did she indicate the matter should proceed to formal Review.

On February 21, 2011, the Mount provided its final Representation to the Review Office by email. The email Representation provided as follows:

> *Thank you for your support throughout the review process. I sincerely do appreciate it and apologize for any frustration I have caused you or your office.*
>
> *With regard to a response to your Investigation Summary, I have nothing further to add. I realize that, from your view, the case appears weak when tested. However, from my view, the protection of [third parties] is absolutely essential and though [the Applicant] has the right to [his/her] personal information, it cannot be at the expense of the [third parties'] mental or physical health. Whether this harm is perceived or real is open to debate; however I felt it my responsibility to the [third party] to assume that it is real.*
>
> *As you know, I wavered several times throughout the process. This was because:*
>
> 1. *FOIPOP issues do not cross my desk enough for me to be confident in this aspect of my job;*
> 2. *I DO respect the process and the legislation and do understand [the Applicant's] request;*
> 3. *I was torn between my responsibility to both the [third party] and the Act.*
>
> *Again, I appreciate your assistance.*

ISSUES UNDER REVIEW

Whether the Mount appropriately applied the *Act* and, in particular:

1. Whether the Record contains the personal information of the Applicant.
2. If yes, whether the personal information of the Applicant was supplied by third parties in confidence. If yes, whether a summary under s. 20(5) is possible.
3. Whether the Record contains third party personal information.
4. Whether s. 18 of the *Act* allows the Mount to withhold the Record in full.
5. Whether the Mount properly exercised its discretion in applying s. 18 of the *Act* to the Record.
6. Whether the Mount applied the exemptions in a blanket manner or whether severing could have been applied to the responsive Record in accordance with s. 5(2) of the *Act*.
7. Whether the Mount met its statutory duty to assist the Applicant under s. 7 of the *Act*.

DISCUSSION

In its initial decision letter to the Applicant, the Mount first represented that the *Act* had no application to his/her Application for Access to a Record and then stated that if the *Act* did apply, it relied on two exemptions, s. 15 and s. 18, to withhold the Record in full.

During the course of the Review, the issue of the applicability of the *Act* was resolved and the Mount withdrew its reliance on s.15. Therefore, the only exemption that the Mount argues applies to the Record is s. 18, which it applied to withhold the complete Record. The Mount's withdrawal of its reliance on s. 15,"law enforcement", was appropriate in this case as there is no evidence of any harm to the effectiveness of techniques or law enforcement proceedings in relation to the Record.

Personal Information of the Applicant

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

3(1) In this Act,

> *(i) "personal information" means recorded information about an identifiable individual, including*
>
> > *(i) the individual's name, address or telephone number, …*
> > *(iii) the individual's age, sex, sexual orientation, marital status or family status, . . .*
> > *(viii) anyone else's opinions about the individual,*

It is clear that portions of the Record contain the Applicant's personal information. These portions contain the types of information that are all included in the definition of "personal information" found in s. 3(1) of the *Act*. One of the purposes of the *Act* is to give individuals ***the right to access their own personal information*** *[Refer to s. 2(a)(ii) of the Act]*. A review of the Record reveals that a portion of it contains the Applicant's personal information, access to which s/he is entitled under the *Act*, subject to any applicable exemptions, which will be discussed below.

One of the fundamental purposes of the *Act* - to give individuals access to their own personal information - has been the subject of previous Reviews. In two recent decisions, *FI-08-23* and *FI-09-40*, I upheld this right. Both of these Reviews involved public bodies denying applicants access to their own personal information. In *FI-08-23*, I wrote:

> *[J]ust because [the public body] represents that all of the information was denied because it was provided in confidence does not mean the Applicant may not be entitled to his/her personal information in whole or in part. The Act contemplates that information should be severed from a record when it cannot be released but access can be given to the remainder of the record. Just because correspondence contains personal information of a third party, does not mean that the portion of the Record that does not, cannot be released.*

There is no evidence in the Record or supplied in Representations from the Mount that any of the information in the Record was provided in confidence. The FOIPOP Administrator may have assumed this to be the case but that is not a basis for making a determination under the *Act.* The Applicant is entitled to receive his/her own personal information unless another exemption applies. Additionally, information that is in the Record that cannot be classified as

personal information; dates, facts and actions of Mount employees acting in their official capacity should also be disclosed to the Applicant, unless another exemption applies. Even if the information about the Applicant was provided by a third party who believed it was provided in confidence, that is not the basis to necessarily deny access. In Review Report *FI-08-23,* I stated:

> *A person's right to access **their own personal information supplied by a third party** cannot be denied simply because the person supplying it believes it was in confidence. **[Emphasis in the Original]***
> *[FI-08-23]*

The Mount's FOIPOP Administrator demonstrated an understanding of how to redact the Record in accordance with the statute by agreeing on two occasions to the release of a severed version of the Record, providing a copy of what the severing would look like to the Review Office. On both occasions, the Mount recanted and withdrew its agreement to release a severed Record to the Applicant. It is important to note that the proposed severed Record was largely in compliance with how the Record ought to have been provided to the Applicant in the first place. I find that the Record can easily be severed to remove any third party personal information just as the Mount did on these two occasions.

I find that the Record contains the Applicant's personal information, to which s/he is *prima facie* entitled under the *Act*.

Section 20

It should be noted that there is a small amount of personal information of at least one third party in the Record. Section 20 compels public bodies to refuse to disclose personal information if its release would be an unreasonable invasion of the third party's personal privacy. This is a situation where a mandatory exemption may apply to a Record and, while it has not been claimed by the public body, the Review Office must still consider the applicability of the mandatory exemption, in this case s. 20 of the *Act*. The Applicant has clearly stated s/he has no interest in obtaining third party information.

The Mount did not refer to s. 20 in its decision or its Representations. This is unfortunate because where a mandatory exemption may apply, it is incumbent to address it in the Review process. Section 20 of the *Act* reads, in part, 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 . . .*
>
> *20(2) In determining . . . 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. . .*
>
> *20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if . . .*

20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if. . .

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

The opening language of each of the relevant subsections has been laid out to provide the public body with an overview of what ought to have been its process in considering the issue of third party information.

In this case, the Applicant has been perfectly clear from the outset of the Review that s/he does not want access to third party personal information. The Mount appears to have largely ignored this factor. Thus, the only issue is whether the third party information can be severed so the Applicant may have access to his/her personal information and possibly any other information in the Record not related to third parties *[Refer to s. 5(2) of the Act]*.

In conclusion, I find that s. 20(1) of the *Act* applies to a small portion of the Record because it contains third party personal information. The Applicant agrees and has made it clear from the onset that s/he is not interested in this information; therefore, there is no need to go further as the Applicant has no burden to rebut the presumption of unreasonable invasion of privacy. To be clear, this does not apply to the views and opinions expressed about the Applicant by the third parties, which by definition are the personal information of the Applicant. The issue of whether a summary should have been provided is also therefore not relevant.

Section 18

The Mount has withheld the Record in full. The public body relies solely on the exemption in s. 18 of the *Act,* which provides as follows:

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; or
(b) interfere with public safety.

The Mount has applied s. 18(1)(a) and (b) of the *Act* to the Record in full as the FOIPOP Administrator believes that harm could result from the disclosure. This exemption carries a reasonable expectation test which directly links the disclosure of the documents to the harm that is expected to occur. In *FI-07-75,* I stated:

*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 [the public body] to demonstrate this clear connection.*
[Emphasis in Original]

[FI-07-75]

That means the burden rests with the Mount to demonstrate this clear connection between the release of information and the harm with factual evidence provided to the Review Office.

The Mount takes the position that someone else's safety, mental health or physical health, other than the Applicant's, will be threatened as well as public safety will be interfered with if the Applicant is given access to any part of the Record. For each of the subsections of the s. 18 exemption to apply, the Mount must meet its burden to demonstrate a clear connection. The onus on the Mount must first be met in order for the exemption to apply and if the evidence is not forthcoming, the exemptions cannot apply and the issue of exercise of discretion becomes moot.

The FOIPOP Administrator, as the delegated decision-maker for the Mount, proposed a new decision with the outcome being the release of a severed copy of the Record. She explained the withdrawal of this new decision based on her discomfort level. This approach, which hints of a subjective test being applied with respect to the exemption and the exercise of discretion, is to be avoided. It is not how the legislation is intended to be applied and is wholly inappropriate.

The *Act* gives applicants a right to access their personal information except in limited and specific circumstances. This must be the starting point for any Application for Access to a Record. Thereafter, how exemptions are applied and discretion exercised must be done in a manner that is professional, respectful, objective and consistent with the purposes of the statute *[Refer to s. 2 of the Act]*. Exemptions must be applied in a manner that is consistent with the actual facts and evidence in the matter, and is in line with previous interpretations in like Reviews *[Refer to www.foipop.ns.ca for precedents]*.

The Mount was specifically asked for Representations by the Review Office to justify its continued allegation that harm will result from the release of the Record but nothing was submitted. The subjective opinion of the FOIPOP Administrator does not constitute evidence of any veracity whatsoever. I find that this case rests entirely on the same footing as *FI-07-75* because the FOIPOP Administrator's decision is entirely subjective, speculative and assumes an unarticulated connection between the release of the Record and harm to a third party. I find that the s. 18 exemption does not apply.

Exercise of Discretion

Because I find the exemption claimed by the Mount does not apply, it is unnecessary to examine the exercise of discretion by the public body. However, given the FOIPOP Administrator's admission of being unfamiliar with the legislation even though her position includes administration of the *Act*, I will provide a brief discussion of discretion.

Section 18 is a discretionary exemption, not a mandatory one. The Mount has continued to rely on this discretionary exemption. On a review of the Mount's decision to exercise its discretion to withhold the full Record based on s. 18, it is incumbent on the public body to provide sufficient evidence to demonstrate that its decision was reasonable and appropriate in the circumstances. The first question is whether s. 18 applies and the second question whether the Mount exercised its discretion properly under the *Act.* This is done within the context that this Review involves the Applicant's right to his/her own personal information.

In *FI-06-79*, I wrote at length on the exercise of discretion, emphasizing that public bodies must consider all relevant factors. A non-exhaustive list of factors for public bodies to consider is as follows:

> *In exercising discretion, the head considers all relevant factors affecting the particular case, including:*
>
> - *the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
> - *the wording of the discretionary exception and the interests which the section attempts to balance;*
> - *whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*
> - *the historical practice of the public body with respect to the release of similar types of documents;*
> - *the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
> - *whether the disclosure of the information will increase public confidence in the operation of the public body;*
> - *the age of the record;*
> - *whether there is a sympathetic or compelling need to release materials;*
> - *whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and*
> - *when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.*
>
> *BC Order 325-1999*
>
> *[FI-06-79]*

The Mount failed to provide any information as to what factors it considered in applying the exemption. In this case, a Representation would be required outlining the factors considered in deciding to withhold the Record once the Mount made the determination that the requested information fell within s. 18 of the *Act.*

Blanket Application of an Exemption

The Mount claims that the discretionary exemption provided for in s. 18 of the *Act* applies to the whole of both documents in the Record. It is expected that during the course of processing an Application for Access to a Record, the public body will conduct a line-by-line review of each document or part of the record and apply exemptions in a manner that is consistent with the purposes of the *Act*, specific and limited *[Refer to s. 2 of the Act]*. During the initial case review analysis, the Mount prepared and considered releasing a severed version of the Record to the Applicant but later determined that it did not want to proceed. During the Investigation stage, the Mount was asked to revisit this decision, which resulted in again deciding to withhold the Record in full. In essence, the Mount's position is that the entire

contents of the Record must be withheld because a health and safety situation is expected to occur.

The Mount has not provided a Representation during the formal Review stage outlining why severing cannot be used to apply the exemption in a limited and specific manner, as it had proposed to do earlier in the file.

In conclusion, I find that the Mount has failed on both fronts. It has failed to provide evidence:

1. that would show that the disclosure of the Record could reasonably be expected to threaten anyone's health or safety or public safety or to result in immediate and grave harm to the Applicant's safety; and
2. as to why severing cannot be used to apply the exemption in a limited and specific manner, as provided for in s. 5(2) of the *Act*, to provide the Applicant with partial access.

The Nova Scotia Court of Appeal in *Chesal v. Attorney General of Nova Scotia* has made it clear that the *Act* does not create classes of documents that are automatically subject to exemption.

> *[57] To give effect to the appellants' submissions would be to create a blanket privilege for all information pertaining to an aboriginal government. It would matter not whether the information contained in the Audit Report is critical or supportive of the aboriginal policing initiative. It is the position of the appellants that it may not be disclosed without consent. Section 12(1)(a) of the FOIPOP Act clearly does not establish a class exemption from disclosure for all information flowing between governments.*
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> *[58] In Do-Ky et al. v. Canada (Ministers of Foreign Affairs and International Trade), (1999), 173 D.L.R. (4th) 515; F.C.J. No. 673 (Q.L.) (F.C.A.) (Q.L.), affirming, (1997), 143 D.L.R. (4th) 746; F.C.J. No. 145 (Q.L.) (F.C.T.D.) a similarly worded section of the federal Access to Information Act, R.S.C. 1985, c. A-1, was held not to create a class exemption for diplomatic exchanges between governments. Under consideration was s.15(1) of that Act. There, the applicant's request for disclosure of four diplomatic notes exchanged between Canada and another foreign state had been refused by the Minister of Foreign Affairs and International Trade. The refusal was upheld on judicial review by the Federal Court. The package of information in dispute was three notes sent by Canada to the foreign country and one note from that country to Canada. It was accepted that the four notes constituted a dialogue between the governments of the two countries.*
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> *[60] On appeal to the Federal Court of Appeal, in the course of affirming the decision of the trial court, Sexton, J.A. was careful to point out that s. 15(1)(h) did not create a "class exemption" for diplomatic notes. He said:*
>
> > *[8] We should stress however that there is no "class exemption" for diplomatic notes. Under section 15(1) there is no presumption that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations. There*

> *must be evidence of this. Certainly where the documents contain information which, for example, might cast doubt on the commitment of another country to honour its international obligations and that other country objects to the disclosure, the case for exemption will have been made out.*
>
> *[Chesal v. Attorney General of Nova Scotia 2003 NSCA 124]*

Relying on the Court of Appeal's decision in *Chesal,* the Review Officer held in *FI-03-50* that public bodies cannot *replace the exercise of discretion with a blanket policy* for a particular kind of report. *[Also refer to FI-10-26 and FI-02-81]*. On review of the content of the whole Record, I find that it is impossible that the exemption could apply to the Record in its entirety.

Duty to Assist

I want to make one final and important note in this regard particularly given that, during the Review process, the Mount's FOIPOP Administrator acknowledged her lack of experience working under the legislation.

The Mount is a prominent well-respected university. Its Mission and Vision attest to its commitment to accountability, engagement, professionalism and respect. It states in part:

> ***Our people are our foundation and our relationships are built on respect and accountability.***
> ***[Emphasis added]***
> *[Mount Saint Vincent University website www.msvu.ca]*

One of the foundations to hold public bodies to account is to have independent, impartial oversight bodies to review decisions made by government. The Freedom of Information and Protection of Privacy Review Office is one of the independent oversight bodies in Nova Scotia. In keeping with its own Mission and Vision, the Mount is encouraged to recognize the importance of the right of access to information and protection of privacy.

While the FOIPOP Administrator apologized profusely on each and every occasion she made an error under the legislation or caused inordinate delay or reneged on a proposed resolution, her willingness to take responsibility by apologizing, while appreciated, does not excuse all of the problems associated with how this matter has been handled.

The person who has suffered the most in how this matter was first managed and how the Mount processed the Application for Access to a Record and Request for Review is the Applicant. S/he made a simple request for a record consisting largely of his/her personal information on two pages to try to ascertain why s/he has been permanently banned from being on the campus of the Mount without having been given notice, investigated, charged or fined. It is understandable that s/he wants access to this information as s/he has been denied access to a public place without any explanation why. His/her Application for Access to a Record was his/her attempt to understand why. S/he made it clear from the outset and throughout s/he had no interest in obtaining third party information, a fact that the Mount appeared to dismiss or ignore. Nearly two and a half years have passed since his/her original request to the Mount. I find the

Mount has breached its statutory duty to assist the Applicant, the following being the most egregious examples:

1. Advising the Applicant in its original decision that the *Act* did not apply to his/her Application for Access to a Record;
2. Failing to advise the Applicant of his/her right to file a Request for Review of its decision to refuse him/her access to the entire Record;
3. Failing to provide the Applicant reasons how the exemption[s] applied to the Record;
4. Failing to respond in a timely fashion throughout the Review process causing inordinate delay;
5. Recanting on making a new decision and failing to release the redacted Record to the Applicant;
6. Applying a subjective test to the application of the s. 18 exemption without any evidentiary basis.

FINDINGS

1. The Record contains the Applicant's personal information, to which s/he is *prima facie* entitled under the *Act*.
2. Section 15 of the *Act* does not apply to this Record as there is no evidence of harm to investigative techniques, and the Mount correctly withdrew its reliance on an exemption under s. 15 during the Review process.
3. Public bodies should address any mandatory exemption in their Representations to the Review Office. However, even if not claimed, it is incumbent on the Review Officer to consider a mandatory exemption's applicability to the Record. In this case, the mandatory exemption is s. 20.
4. Subsection 20(1) of the *Act* does apply in this case but the Applicant made it clear s/he did not want access to third party information.
5. There is no evidence the Applicant's personal information was supplied in confidence.
6. The Record can easily be severed to remove any third party personal information.
7. The FOIPOP Administrator's decision is entirely subjective, speculative and assumes an unarticulated connection between the release of the Record and harm to a third party.
8. The s. 18 exemption does not apply, which makes it unnecessary to consider the exercise of discretion.
9. Had s. 18 been found to apply, it should not have been applied in a blanket manner to the entire Record. All records must be reviewed line by line; only the information subject to the exemption should be withheld.
10. I find the Mount has breached its statutory duty under s. 7 of the *Act* to assist the Applicant, the following being the most egregious examples:

    i. Advising the Applicant in its original decision that the *Act* did not apply to his/her Application for Access to a Record;
    ii. Failing to advise the Applicant of his/her right to file a Request for Review of its decision to refuse him/her access to the entire Record;
    iii. Failing to provide the Applicant reasons for how the exemption[s] applied to the Record;
    iv. Failing to respond in a timely fashion throughout the Review process causing inordinate delay;

v. Recanting on making a new decision and failing to release the redacted Record to the Applicant;
vi. Applying a subjective test to the application of the s. 18 exemption without any evidentiary basis.

RECOMMENDATIONS

I want to premise my Recommendations with the following. I am concerned that this case may show a lack of commitment to FOIPOP at the Mount. This is not just about the person responsible as the delegated authority under the *Act*. Some of the findings in this Review point to serious problems, which can only be resolved by the Mount's leadership. When applicants under the legislation are advised the *Act* does not apply while at the same time not being told they have a right to file a Request for Review, this is very problematic. The commitment to the right to access information must come from the university as a matter of principle and it must support the important work of the FOIPOP Administrator in practice.

I make the following recommendations to the Mount:

1. Release the complete Record to the Applicant with the personal information of all third parties severed.
2. Support the FOIPOP Administrator's office in its efforts to participate in further FOIPOP training through the office of the Chief Information Access and Privacy Officer.

Respectfully,

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