



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-23**

- Report Release Date:** January 18, 2010
- Public Body:** Department of Community Services
- Issues:** Whether the Department of Community Services [“Community Services”] has properly withheld portions of the Record in accordance with the *Freedom of Information and Protection of Privacy Act* [“Act”], and, in particular:
1. Whether the Record contains the personal information of a third party or third parties.
 2. Whether the Record contains the personal information of the Applicant.
 3. Whether s. 20 of the *Act* requires Community Services to withhold the Record in full. Alternatively, whether Community Services could have severed portions of the Record or provided the Applicant with a summary of the Record.
 4. Whether the Review Officer will accept Community Services’ late exemption claim, the Representations for which were provided in-camera.
 5. If yes, whether the late exemption claimed allows Community Services to withhold the Record in part and whether Community Services properly exercises its discretion in applying the late exemption to the Record.
 6. Whether the information included in the disclosure decision was open, accurate and complete.

Record at Issue:

Pursuant to s. 38 of the *Act*, Community Services has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Freedom of Information and Protection of Privacy Review Officer or her delegated staff. The Record at issue consists of two handwritten letters written by a third party. The Applicant has confirmed that s/he is seeking access to the letters in full, which includes access to his/her own personal information, and the personal information of third parties.

Findings:

The Review Officer made the following findings:

1. The Record contains the personal information of third parties. The bulk of the information contained in the Record is the personal information of third parties, which if released would be an unreasonable invasion of the third parties' privacy, and as such the Applicant is not entitled to have access to any third party personal information.
2. There are parts of the Record that contain the Applicant's personal information to which, *prima facie*, s/he is entitled. During the Representation phase of the Review, Community Services made a submission that in addition to s. 20, the Record should be withheld under the late exemption claimed.
3. A great deal of information provided to Community Services is often provided on a confidential basis and is protected by law. However, writing to Community Services about confidential matters does not necessarily protect the whole of the communication. The subsections of s. 20 relied upon by Community Services serves to protect certain information from disclosure.
4. Because of the nature of the letter and to whom it is directed, I find that a third party supplied most of the information in the Record on a confidential basis. This is supported by the information provided by Community Services that the recipient of the letter forwarded it to child protection. The portion of the Record that contains the personal information of the Applicant, however, cannot be withheld because part or most of the Record is personal information about a third party. Based on that finding, Community Services was obliged to consider providing the Applicant with a summary of his/her

personal information contained in the Record.

Community Services argues that there is no way to sever the Record without disclosing the identity of a third party. I agree that severing the handwritten Record could disclose the identity of a third party. I find, however, that a summary of the portions containing only the Applicant's personal information can be prepared for the Applicant without the disclosure of third party personal information, the release of which could compromise a child protection matter.

5. Community Services provided sufficient information to the Review Officer to support a finding that its Representations could be considered in-camera with respect to a late exemption and that the late exemption remain confidential.
6. I find that because s. 20 is applicable to all of the third parties' personal information it is not necessary for me to consider the applicability of the late exemption to that information.
7. In regards to the applicability of the late exemption to the Applicant's personal information, I consider there was insufficient evidence provided to support the reliance on the late exemption. In order for that exemption to apply a public body must provide evidence that there is a real and probable connection between the late exemption and the evidence in the case. There was some evidence that supported considering the matter in-camera. Sufficient evidence demonstrating that the late exemption ought to apply, however, was not provided to the Review Officer.
8. I find that Community Services in its initial decision did not meet the standard of its duty to assist the Applicant. This is because Community Services merely cited s. 20 and s. 20(1) of the *Act* and failed to clarify which subsections it was applying and therefore did not meet the test of "open, accurate and complete." This was later fully rectified when the file was transferred from a regional delegated office to the main FOIPOP office at Community Services during the course of the Review.

Recommendation:

The Review Officer recommended the following:

That Community Services prepare a summary of the Applicant's personal information contained in the Record. To this end, a sample of what the summary could look like has been prepared and provided to Community Services only with

this Review Report. This summary is intended to demonstrate that such a summary can be prepared that would include the personal information of the Applicant that may have been provided by a host of individuals and would not identify the third party.

Key Words: balance, confidential, handwritten, in-camera, letters, mandatory, open, accurate and complete, personal information, privacy, probable, right of access, summary, third party, third party personal information.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act* ss. 2, 5, 3(1)(i), 3(1)(l), 5(2), 20, 20(1), 20(2), 20(2)(c), 20(2)(f), 20(3)(a), 20(3)(c), 20(3)(d), 20(4), 38, 44, 45(2).

Case Authorities Cited: *NS Reports FI-07-75, FI-06-71(M); BC Order F08-02; ON Orders PO-2230, PO-2706, PO-2230; Re House, [2000] N.S.J. No. 473 (S.C.); McCormack v. Nova Scotia (AG), [1993] N.S.J. No. 625; Keating v. Nova Scotia (AG), 2001 N.S.S.C. 85.*

REVIEW REPORT FI-08-23

BACKGROUND

On January 2, 2008 the Applicant made an Application for Access to a Record to the Department of Community Services [“Community Services”] that read as follows:

This is an application pursuant to the Freedom of Information and Protection of Privacy Act to: both applicant’s own personal information and other information. Letter recieved [sic] From I assume [a third party] . . . Letter and all files

On January 8, 2008 Community Services transferred the Application for Access to a Record to another public body thought to be in possession of the Record. On January 16, 2008 that public body forwarded the request to the local Community Services office.

On February 1, 2008 Community Services made a decision with respect to the Application for Access to a Record:

On Thursday, January 24, 2008, I contacted you by telephone seeking clarification on your request and you advised that you were requesting access to letters on file that were submitted to your caseworker by a third party.

Your request for access to information has been denied pursuant to Section 20 of the Act. Section 20 of the Act prohibits the disclosure of personal information to an applicant if that disclosure would result in an unreasonable invasion of a third party’s personal privacy.

The decision letter to the Applicant did not contain the subsections of s. 20 of the *Freedom of Information and Protection of Privacy Act* [“Act”] on which Community Services was relying to withhold the Record in full. The letter cited s. 20 and the text of s. 20(1) of the *Act* without any further explanation regarding its decision.

On February 19, 2008 the Applicant filed a Form 7 Request for Review of Community Services’ decision and asking the Review Officer to recommend that the head of the public body give access to the record as requested in the Application for Access to a Record.

On February 4, 2009 the Review Office provided the Applicant with a letter explaining the issues under Review and providing copies of case precedents to assist him/her in the Review. The Applicant responded to the Review Office but appeared to be focussed principally on a breach of confidentiality. S/he was advised how to proceed with a Privacy Complaint and informed that it was not a part of the Request for Review with respect to his/her Application for Access to a Record.

On June 22, 2009 the Review Office sought additional information from Community Services. On June 30, 2009 Community Services confirmed with the Review Office that it was applying the following subsections to the two documents that form the Record:

- Subsections of the exemptions claimed: 20(1), 20(3)(a), 20(3)(c), 20(3)(d)
- Factors favouring non-disclosure: 20(2)(c), 20(2)(f).

Community Services also confirms that it considered s. 5(2) of the *Act* but believed it was not possible to sever some of the information without identifying a third party.

On August 11, 2009, Community Services requested that a late exemption be considered in-camera. Community Services provided evidence in support of this request in a Representation dated September 10, 2009. Based on the evidence provided, on September 28, 2009 I made a finding that the information provided was sufficient for the matter to be considered in-camera. This finding was restricted only to the fact that Community Services had provided enough evidence to support going in-camera, not necessarily with respect to whether the late exemption applied.

During the formal Review, I made further inquiries of Community Services. On January 8, 2010, I requested that Community Services provide evidence with respect to any referral made to child protection as a result of the contents of the Record. On January 11, 2010, Community Services provided its response, which is detailed in its Representations below.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Community Services has provided the Freedom of Information and Protection of Privacy [“FOIPOP”] Review Office with a copy of the complete Record, which is all of 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 at issue consists of two handwritten letters written by a third party. The Applicant has confirmed that s/he is seeking access to the letters in full, which includes access to his/her own personal information, and the personal information of third parties.

APPLICANT’S REPRESENTATIONS

On August 14, 2009, the Applicant provided an oral Representation to the Review Office. Details of the Applicant’s Representations are as follows:

1. The Applicant is seeking access to his/her personal information, and the personal information of third parties; the complete Record with no severances.

2. The Applicant was not prepared to focus on particular parts of the Record.
3. The Applicant indicated that s/he had already obtained the Record at issue in this Review through another avenue, but wanted to receive it from Community Services as well.

During this oral Representation, the Review Office informed the Applicant that any interest on the part of the Applicant in obtaining any other records beyond the letters would require the Applicant to submit a new Form 1 Application for Access to a Record.

The Applicant was fully informed that because part of the Record involved a third party's personal information, the burden was with him/her to demonstrate release of the Record would not be an unreasonable invasion of a third party's privacy. The Applicant indicated a willingness to do so when the time for further Representations was made known to him/her.

On November 25, 2009 the Applicant submitted a Representation to the Review Officer, which is summarized as follows:

1. The Applicant acknowledges that the burden rests with him/her to prove that release of third party information would not be an unreasonable invasion of privacy.
2. If the letters are not marked personal and confidential, s/he doesn't feel that it would be an unreasonable invasion of privacy to give him/her third party information.
3. The Applicant believes the letters are harassing and defamatory in nature and s/he wants all the records from a Community Services office and the local agency that has his/her personal information and any allegations about him/her. [The Review Office explained to the Applicant, both before and after this Representation was received, that this broader Application for Access to a Record would require a new Form 1].
4. The Applicant indicates that it was two years ago that s/he requested copies of the letters making up the Record and that s/he has documentation proving who wrote the letters that contain allegations about him/her. [The Review Office subsequently requested that the Applicant provide copies of this documentation but s/he did not].

PUBLIC BODY'S REPRESENTATIONS

On August 11, 2009 Community Service requested that the Review Officer accept a late discretionary exemption and to accept it in-camera, in other words, on a confidential basis. Based on the Representations provided by Community Services on September 10, 2009, the Review Officer accepted its submission regarding the late exemption in-camera.

On December 7, 2009 Community Services provided its Representation for the formal Review. That Representation is summarized as follows:

1. The original request was processed by a regional delegate, authorized under s. 44 of the *Act* to release information to applicants if the information relates to family benefits, employment support and income assistance.
2. Responses to questions posed by the Review Office and responded to by Community Services on April 14, 2009 and June 30, 2009 were to form part of its Representations.
3. The in-camera Representation with respect to a late exemption should be considered in conjunction with the final Representation.
4. Community Services indicates that the letters forming the Record are written by hand.
5. The Record contains personal information of third parties and the Applicant.
6. In considering the Application for Access to a Record, Community Services relied on s. 20 of the *Act* and the test as outlined in the *Re House* decision:
 - a. The information was personal information within the meaning of s. 3(1)(i).
 - b. Section 20(4) did not apply.
 - c. Determined that the conditions within s. 20(3) applied and that disclosure of the letters would be an unreasonable invasion of the author's privacy and the privacy of others.
7. Community Services understands that the *Act* contemplates severing of the information about third parties in order to disclose information about an applicant to an applicant.
8. The information expressed in the letters is opinions and views of third parties who likely gave no thought that what was written would be considered information about others.
9. The personal information in the letters about the Applicant is heavily intertwined with the information about others including a third party.
10. Providing a summary, transcript or a severed copy of the letters would be impossible without identifying a third party.
11. There is no way to protect the privacy of a third party or third parties given the way the letters are written. The end result would be that a third party or third parties would be identified.
12. The average person has an expectation that information provided to government will be maintained in confidence. The letters are communications between a third party and his/her government worker, which the third party would have considered had been provided on a confidential basis.
13. By the way the letters are written it is reasonable to conclude that a third party may think Community Services may consider it relevant to the wellbeing of a child.

On January 11, 2010, Community Services responded to an inquiry from me during the formal Review. It was not clear from what had previously been provided to the Review Office that there was a connection between the contents of the Record and the fact that this matter involved child protection. That Representation confirmed that there was a

referral by the income assistance worker to child protection officials as a result of receiving the Record from a third party. Community Services provided detailed documentation demonstrating the fact a referral was made and the subsequent action taken by the child protection agency.

ISSUES

Whether Community Services has properly withheld portions of the Record in accordance with the *Act* and, in particular:

1. Whether the Record contains the personal information of a third party or third parties.
2. Whether the Record contains the personal information of the Applicant.
3. Whether s. 20 of the *Act* requires Community Services to withhold the Record in full. Alternatively whether Community Services could have severed portions of the Record or provided the Applicant with a summary of the Record.
4. Whether the Review Officer will accept Community Services' late exemption claim, the Representations for which were provided in-camera.
5. If yes, whether the late exemption claimed allows Community Services to withhold the Record in part and whether Community Services properly exercised its discretion in applying the late exemption to the Record.
6. Whether the information included in the disclosure decision was open, accurate and complete.

DISCUSSION

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

2 The purpose of this Act is

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

(i) giving the public a right of access to records,

*(ii) **giving individuals a right of access to, and a right to correction of, personal information about themselves,***

(iii) specifying limited exceptions to the rights of access,

(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

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

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

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

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

[Emphasis added]

The Applicant's right of access referred to in the purpose section is provided for in s. 5 of the *Act* as follows:

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.

Section 20 is a mandatory exemption requiring public bodies to refuse to disclose personal information if it can be demonstrated that its release would result in an unreasonable invasion of personal privacy. Review Officers have considered the application of s. 20 in numerous orders [for example see *FI-08-12*] and the principles and the approach for its application are well established. I have applied those principles here without repeating them. The Representations provided by Community Services reflect an understanding of those principles and that approach.

Although the Review Office does not reveal the content of the Record, and thereby the withheld information, it is necessary to categorize the types of withheld information, to understand what types of information have been withheld in order to make sense of this Report. In this case, considering the exemptions claimed by Community Services, the information can be described as follows:

- Financial related information
- Medical history
- Employment history
- Comments about the Applicant
- Comments about third parties
- Information related to eligibility for income assistance or social-service benefits
- Dates
- Date stamp
- Name of Community Service employee
- Names of third parties
- Personal inquiries

- Allegations against the Applicant
- Inquiries about the Applicant
- Views and opinions of the third party
- Views and opinions about the Applicant

From the categories described above, it is clear that there is a mixture of personal information of third parties and of the Applicant. The entire Record was withheld by Community Services.

The decision letter to the Applicant referred to s. 20 and cited s. 20(1). On June 30, 2009, Community Services provided the particulars of the subsections of s. 20 being relied upon:

Subsections exemptions claimed: 20(1), 20(3)(a), 20(3)(c), 20(3)(d)
Factors favouring non-disclosure: 20(2)(c), 20(2)(f).

Subsection 20(2)(c) is, in fact, a factor favouring disclosure – release relevant to a fair determination of an applicant’s rights – not non-disclosure. On October 21, 2009, Community Services acknowledged this fact and indicated the subsection had been cited in error. I agree it has no applicability in this case.

The discussion will now consider the applicability of the other subsections of s. 20 of the *Act* claimed by Community Services.

Third party personal information

A third party is defined by the Act as:

3(1)(m) . . . any person, group of persons or organization other than

- (a) the person who made the request, or*
- (b) a public body*

The *Act* allows for individuals to act on behalf of other individuals to access their personal information in certain circumstances, such as for deceased persons or children.

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

- (a) where the individual is deceased, by the individual's personal representative if the exercise of the right or power relates to the administration of the individual's estate;*
- (b) where a personal guardian or property guardian has been appointed for the individual, by the guardian if the exercise of the right or power relates to the powers and duties of the guardian;*

- (c) where a power of attorney has been granted, by the attorney if the exercise of the right or power relates to the powers and duties of the attorney conferred by the power of attorney;*
- (d) where the individual is less than the age of majority, by the individual's legal custodian in situations where, in the opinion of the head of a public body, the exercise of the right or power would not constitute an unreasonable invasion of the privacy of the individual; or*
- (e) by a person with written authorization from the individual to act on the individual's behalf.*

The Applicant has not provided any proof that s/he is the appropriate person to exercises the powers of any of the third parties, in accordance with this section, therefore this means that all other individuals referenced fall within the definition of a third party for the purpose of this Application for Access to a Record.

The essential question in this case becomes – whether the three subsections of s. 20(3) apply in this case to set up a presumption that release would be an unreasonable invasion of privacy of a third party and that the mandatory exemption requires Community Services to withhold the Record.

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

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

*(f) the personal information has been **supplied in confidence**;*

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

*(a) the personal information relates to a **medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation; . . .***

*(c) the personal information relates to **eligibility for income assistance or social-service benefits or to the determination of benefit levels;***

*(d) the personal information relates to **employment or educational history; . . .***

(5) On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be

prepared without disclosing the identity of a third party who supplied the personal information.

(6)The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).

[Emphasis added]

For the purpose of personal information of third parties, I find this exemption applies and the portion of the Record containing it should be withheld. The question becomes; if the public body refused to disclose information because it was received in confidence, what are the factors to consider in addressing whether or not something has been received in confidence? The Nova Scotia Supreme Court relied on an analysis done by another Canadian Commissioner addressing the issue of confidentiality:

[56] The matter of a determination of whether information was "received in confidence" was examined closely in Order No. 331-1999; Vancouver Police Board, [1999] B.C.I.P.C.D. No. 44. In that case the Commissioner posed the question to be addressed as follows:

37 What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following factors - which are not necessarily exhaustive - will be relevant in s.16(1)(b) cases:

- 1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?*
- 2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?*
- 3. Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood there was a true expectation of confidentiality.)*
- 4. Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)*
- 5. Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?*

6. *Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?*
7. *What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?*

[Keating v. Nova Scotia (AG), 2001 N.S.S.C. 85]

The two handwritten letters forming the Record were not marked confidential but upon review of the information in the Record, I find that a third party had a reasonable expectation the some of the information would remain confidential. In fact, upon further inquiry to Community Services as part of the formal Review, it was confirmed that based on some of the information, a case worker referred the matter to child protection. Subsection 20(2)(f), therefore, applies in this case as being a relevant consideration for Community Services in determining whether release could constitute an unreasonable invasion of someone's personal privacy.

Part of the Record, therefore, must be considered in a child protection context. I know of no cases where the identity of a third party contacting agencies like Community Services has been released. For example there are five case decisions by the Nova Scotia Review Officer – *FI-99-64; FI-99-99; FI-00-79; FI-00-86; FI-05-83* – in which the Review Officer decided that release of the personal information of a third party who contacted Community Services about another individual was deemed to be an unreasonable invasion of a third party's privacy. I find in this case that information would have been considered by a third party to have been provided in confidence and, thereafter, was received and processed by Community Services as a child protection matter. By the way the letters are written it is reasonable to conclude that the recipient passed them on under his/her statutory duty. The referral source made a child welfare referral to another Department within Community services in accordance with the statutory duty to report, which provides as follows:

Children and Family Services Act

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

On review of the whole of the Record, I find that the three subsections of the s. 20 exemption relied upon by Community Services do apply to the personal information of a third party or the third parties and that the factors favouring non-disclosure have been appropriately considered. At this point, the onus shifts to the Applicant to provide evidence that would rebut the presumption.

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

(2) Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.

[Emphasis added]

Despite the fact that s/he has been advised repeatedly and acknowledged in his/her own Representations that the burden rests with him/her, the Applicant has not provided any factors that demonstrate there would be no breach of personal privacy and thus favour disclosure. With respect to the portion of the Record containing third parties' personal information, I find that it has been appropriately withheld under ss. 20(3)(a), 20(3)(c), 20(3)(d) of the *Act*.

Applicant's own personal information

That being said, just because Community Services 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. While the case below is different because here the Applicant seeks access to all the information in the Record including personal information of a third party, it helps define the issue of supplied in confidence:

*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.*

"It appears that the Legislature has, in s. 3(1)(i)(ix)[s. 461(f)(ix)], come to grips with one aspect of a clash inherent to a legislative scheme that attempts to balance access to information and protection of privacy. The clash arises where one person addresses a public body about another. The person who is the subject of the communication may have an interest in knowing what information was given, and the person also has a privacy interest at stake if others seek access to a record of the communication. The person who provided the information may also have a privacy issue at stake, where, for example, the information was provided in confidence. The interests of the two are mutually exclusive. The effect of the [section] is to come down on the side of the person spoken about where the information is a personal view or opinion about that person. Thus, if one

asserts fact about another and the information is recorded, it is “recorded information about an identifiable individual.” [French v. Dalhousie University (2002), NCSC 22 (Can Lll), at para 17.]

The Applicant has a statutory right of access to any record in the custody of a municipality pursuant to s. 465 of the MGA subject to statutory exemptions. This is consistent with the purpose of the legislation contained in s. 462(a)(ii) of the MGA that provides that municipalities are to be fully accountable by giving individuals access to records. The Applicant was very clear in his request that he was seeking access to only personal information about him and not about any other person or third party. Section 461(f) states that personal information means “recorded information about an identifiable individual.”

The dates and times of events contained in the record that are about the Applicant are the very kind of information to which the Applicant is entitled.

[FI-06-71(M)]

[Emphasis in original]

I find all of the personal information, including the Applicant’s, was provided in confidence and, therefore, s. 20(5) of the *Act* automatically comes into play. Community Services did not provide the Applicant with a summary and made no Representation to the Review Officer in this regard. Community Services did indicate that because the Record is handwritten that may result in identifying a third party, it was not prepared to release any portion of the Record. Where it refuses access to personal information about an applicant to an applicant under s. 20(2)(f) – on the basis of confidential supply of information – a public body *shall* pursuant to s. 20(5) of the *Act* give an applicant a summary. The public body has no discretion not to provide a summary.

[46] . . . The applicant’s colleagues and his supervisor were in many cases asked the same or similar questions about the applicant, his allegations against his supervisor, his dealings with others and his account of incidents involving himself and others. They often provided similar responses to these questions. In these cases, while the personal information of the applicant is often intertwined with that of third parties, I believe it is possible to create a summary of the applicant’s own personal information as it relates to himself alone, or to workplace events, without revealing the identities of the third parties who supplied this information in confidence. It should also be possible to include the questions in such a summary.

[47] Such a summary will necessarily include some information about third parties, principally the supervisor, where they are mentioned together or where they were involved in incidents with the applicant. In these cases, however, there is no unreasonable invasion of their privacy by disclosing this information to him, as the applicant is aware of these incidents. The applicant will learn more about what was said about him and his allegations, but will not learn who said those things.

[48] There may be instances, in this case, where only one person was in a position to provide the applicant's and third parties' personal information as it relates to an incident or allegation, rendering it impossible to summarize the withheld information without revealing that person's identity. Still other portions of the withheld information relate entirely to third parties and the applicant is not entitled to this information, directly or through a summary under s. 22(5). [BC Order 02-21]

The only condition is that a summary need not be provided where its release would disclose the identity of a third party who supplied the information. This disclaimer is particularly important in the case of a confidante in a child protection context. No personal information of the Applicant would be appropriately released if it were to identify a confidante. On a review of the relevant sections of the Record, I find that a summary of certain portions of the Applicant's personal information can be prepared without disclosing the identity of any third party.

There are two remaining issues: intertwined personal information and the fact the Record is handwritten. In some instances, the Applicant's personal information is so intertwined with the personal information of a third party or third parties that it would be impossible to summarize without identifying the third parties. This is consistent with the findings in *FI-07-75* that also involved a Record that was handwritten though in that case the information could be transcribed and severed. In this case a transcription would be very difficult as the personal information of the Applicant and the third party is inextricably intertwined [*Refer to BC Order F08-02, Ontario Orders PO-2230 and PO-2706*]. In this case, preparing a summary also avoids the problem of identification of the author by virtue of the Record being handwritten.

It appears that Community Services may have given greater credence to protecting the identity of a third party or third parties than it gave to considering the right of the Applicant to access any personal information. While caution is required on the part of any public body responsible for the protection of children, Community Services for one must be aware that there is a very delicate balance between privacy and access – but it is in fact a balance to be reached and not a blanket privacy override. The example of the summary of the Record prepared for Community Services for its consideration as part of the Recommendation, demonstrates how to provide as much personal information to the Applicant without identifying any third party, the release of which could compromise a child protection matter.

LATE EXEMPTION

Initially Community Services said that s. 20 – the personal information exemption – applied to the whole Record. Latterly, Community Services made a late exemption claim on an in-camera basis for some of the portions of the Record. I am treating those portions of the Record as being subject to both s. 20 and the late exemption, which I accepted based on the evidence provided for consideration during the Review.

I refer to a recent Review Report *FI-07-75* in which the issue of late exemption is thoroughly canvassed. It is unnecessary to repeat that discussion here.

Where I have found that the s. 20 exemption is applicable to the third parties' personal information, it is unnecessary to consider the late exemption's applicability. Based on the information provided by Community Services on an in-camera basis, though I will not provide any details on what that was, I am not satisfied on the basis of that evidence that the exemption would, had it been necessary to consider, have been applicable to the Record.

DUTY TO ASSIST

The Review Office believes that a public body's duty to assist under s. 7(1)(a) of the *Act* includes a complete exploration of the factors considered in applying an exemption.

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

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

In its decision letter to the Applicant Community Services included neither which subsections of s. 20 were applied in its decision or the weighing factors that were considered favouring non-disclosure. Nor were any reasons given by Community Services for its decision by way of an explanation to the Applicant as to why those particular subsections required it to withhold the information. On June 22, 2009 the Review Office requested particulars from Community Services as to which subsections of s. 20 it considered applicable in this case. Community Services did respond with those particulars promptly and indicated it was relying on specific subclauses of ss. 20(4), 20(3) and 20(2), as outlined above.

The Supreme Court of Nova Scotia has established an important precedent regarding the application of the *Act*. In *McCormack v. Nova Scotia*, the judge ruled as follows:

. . . when the Minister determines that an exemption applies, she should tell the Applicant that she has read (or been briefed upon) the requested information and, insofar as possible, should detail for the Applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough.

[McCormack v. Nova Scotia (AG), [1993] N.S.J. No. 625]

While the bulk of the gaps in the decision provided to the Applicant initially was rectified during the course of the Review, it is important to remind Community Services' delegates in the field as to the importance of the requirements of s. 7 of the *Act*.

FINDINGS

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

1. The Record contains the personal information of third parties. The bulk of the information contained in the Record is the personal information of third parties, which if released would be an unreasonable invasion of the third parties' privacy, and as such the Applicant is not entitled to have access to any third party personal information.
2. There are parts of the Record that contain the Applicant's personal information to which, *prima facie*, s/he is entitled. During the Representation phase of the Review, Community Services made a submission that in addition to s. 20, the Record should be withheld under the late exemption claimed.
3. A great deal of information provided to Community Services is often provided on a confidential basis and is protected by law. However, writing to Community Services about confidential matters does not necessarily protect the whole of the communication. The subsections of s. 20 relied upon by Community Services serve to protect certain information from disclosure.
4. Because of the nature of the letter and to whom it is directed, I find that a third party supplied most of the information in the Record on a confidential basis. This is supported by the information provided by Community Services that the recipient of the letter forwarded it to child protection. The portion of the Record that contains the personal information of the Applicant, however, cannot be withheld because part or most of the Record is personal information about a third party. Based on that finding, Community Services was obliged to consider providing the Applicant with a summary of his/her personal information contained in the Record. Community Services argues that there is no way to sever the Record without disclosing the identity of a third party. I agree that severing the handwritten Record could disclose the identity of a third party. I find, however, that a summary of the portions of the Record containing only the Applicant's personal information can be prepared for the Applicant without the disclosure of third party personal information, the release of which could compromise a child protection matter.
5. Community Services provided sufficient information to the Review Officer to support a finding that its Representations could be considered in-camera with respect to a late exemption and that the late exemption remain confidential.
6. I find that because s. 20 is applicable to all of the third parties' personal information it is not necessary for me to consider the applicability of the late exemption to that information.
7. In regards to the applicability of the late exemption to the Applicant's personal information, I consider there was insufficient evidence provided to support the reliance on the late exemption. In order for that exemption to apply a public body must provide evidence that there is a real and probable connection between the late

exemption and the evidence in the case. There was some evidence that supported considering the matter in-camera. Sufficient evidence demonstrating that the late exemption ought to apply, however, was not provided to the Review Officer.

8. I find that Community Services in its initial decision did not meet the standard of its duty to assist the Applicant. This is because Community Services merely cited s. 20 and s. 20(1) of the *Act* and failed to clarify which subsections it was applying and therefore did not meet the test of “open, accurate and complete.” This was later fully rectified when the file was transferred from a regional delegated office to the main FOIPOP office at Community Services during the course of the Review.

RECOMMENDATION

I make the following recommendation:

That Community Services prepare a summary of the Applicant’s personal information contained in the Record.

To this end, a sample of what the summary could look like has been prepared and provided to Community Services only with this Review Report. This summary is intended to demonstrate that such a summary can be prepared that would include the personal information of the Applicant without identifying any third party.

Respectfully,

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