REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-26(M)

Report Release Date: January 12, 2009

Public Body: Halifax Regional Police

Issues:

1. Whether the Halifax Regional Police ["HRP"] fulfilled its duties in accordance with the *Municipal Government Act* ["the *Act*"];
2. Whether the HRP failed to comply with the *Act* with respect to seeking time extensions;
3. Whether the HRP's failure to comply with the *Act* is a deemed refusal and whether a deemed refusal can be cured by a subsequent decision or partial decision by a public body.
4. Whether a conflict of interest affected the processing of the Applicant's Application for Access to a Record;
5. Whether the person who made the decisions in response to the Applicant's Application for Access to a Record had the requisite delegated authority as a responsible officer as defined by the *Act*;
6. Whether the HRP inappropriately identified the Applicant as a requester to HRP employees who are not responsible for processing Freedom of Information and Protection of Privacy Applications for Access to Record;
7. Whether the *Act* allows the HRP to refuse access to the records that are stored electronically on back-up tapes.

Record at Issue:

A Record has been provided by the HRP in response to the Applicant's Application for Access to a Record, which is not at issue in this Review. Only the current emails and back-up emails, the subjects of the deemed refusal, are the Record at issue.

Summary:

An Applicant requested information from the HRP regarding his/her employment with the HRP including current and past emails.
The HRP did not respond to the Applicant within the statutory 30 day time limit, nor did the HRP request an extension of time from the Review Officer in accordance

with the statutory requirements. The Applicant subsequently requested a Review which was opened as a deemed refusal. The HRP did not respond to the Review Office within the statutory 15 day time limit and the Review Office proceeded to request representations from the HRP.
The HRP issued a partial decision but indicated that retrieving the requested emails would involve manually restoring back-up tapes from archives. The HRP informed the Applicant that once the emails were available, they would be forwarded to the Applicant. No anticipated date of disclosure was given to the Applicant.
The Applicant subsequently filed an amended Form 7 indicating that the HRP employee who was processing his/her Application for Access to a Record was in a conflict of interest because of that employee's involvement in a personnel matter.
In its representations to the Review Officer, the HRP advanced the position that creating records for the emails that are not currently on the system would unreasonably interfere with the operations of the public body.
The Review Officer found that the HRP did not comply with its statutory duty to assist the Applicant and has yet to release the email portion of the Record to which the Applicant is entitled; that the person who did process the Application for Access to a Record did not have the delegated authority to make a decision under the *Act* and was in a conflict of interest which was never addressed by the HRP; that the identity of the Applicant was inappropriately disclosed to others within the HRP.

Recommendations:

1. The responsible officer make a decision regarding the current system emails [including any improperly deleted] and provide immediate access to the Applicant in accordance with the *Act*;
2. The responsible officer re-affirm the decision not to grant access to the emails found on back-up tapes, with the exception of any that may have been inappropriately deleted once the Application for Access to a Record was submitted;
3. The HRP revamp its system of processing Applications for Access to a Record to ensure greater compliance with statutory timelines in which to respond to applicants;
4. The HRP ensure that only those with a properly executed delegated authority have access to information about applicants and Applications for Access to a Record.

Key Words: back-up email, bias, burden of proof, conflict of interest, creating a record, curing a deemed refusal, deemed refusal, delegation, identity of the requester/Applicant, malicious,

responsible officer, unreasonably interfere with operations of the municipality.

Statutes Considered: *Part XX of the Municipal Government Act ss. 461, 462, 467(1), 467(2), 467(3), 468(1), 468(2), 468(3), 469, 497.*

Case Authorities Cited: *NS FI-07-55; ON Orders PO-2698, MO-2227, MO-1519, M-1091, Order MO-1283; BC Order 02-25.*

Other Cited: *Procedures Manual – FOIPOP (2005).*

REVIEW REPORT FI-08-26(M)

BACKGROUND

On February 25, 2008, the Applicant requested information from the Halifax Regional Police ["the HRP"], specifically requesting access to:

> *. . . contents of all performance reports both official and unofficial, contents of all correspondence, all files, memorandums, notebooks, planners, maps, drawings, pictorial or graphic work, photographs, films, microfilms, sound recordings, video tapes, machine reliable records, and any other documented material including e-mails (sent, received, deleted, forwarded and archived) regardless of physical form or characteristics in relation to my employment and severance with the Halifax Regional Police between the dates of September 21, 2006 to the present prepared by and/or received by the HRP and [Names of 10 specific HRP employees].*

On April 9, 2008, the Applicant requested a Review, as no response had been received from the HRP within 30 days as required by s. 467(2) of the *Municipal Government Act* ["the *Act*"]. The Review Request was therefore opened as a deemed refusal and, in accordance with Review Office practice for most cases dealing with deemed refusals, the file was expedited.

On April 11, 2008, the Review Office sent acknowledgement letters to the Applicant and the HRP requesting a response within 15 days. As no response was received from the HRP, the Review Office forwarded a letter requesting representations to be submitted within 10 days.

On May 14, 2008, the HRP issued a partial decision which provided:

> *Please find attached a copy of your file which includes Officer Performance Files. Your request for retrieval of email is being worked on, however, HRM technicians advise that it will take someone working full-time for up to three (3) weeks to retrieve as they have to manually restore back-up tapes from archives. Once this information is available, I will forward same to you.*

On June 19, 2008, the Review Office wrote to the HRP indicating that notice was received from the Applicant that the HRP had not yet provided him/her with the emails. This was 115 days after the Application for Access to a Record was provided to the HRP and 36 days after the Applicant had been notified that retrieval of the emails would take 21 days.

On June 26, 2008, the HRP wrote a letter to the Applicant updating him/her regarding the emails. No date was provided as to when the emails would be made available.

At no time throughout this Review did the HRP request from the Review Officer an extension of time in which to respond in accordance with the requirements in s. 469 of the *Act.*

On July 25, 2008, the Review Officer communicated with the HRP by letter advising it that neither the Review Officer nor the Applicant had received notice of an extension of time request even though this is required within 30 days of the Application for Access to a Record and it was now 151 days from when it was submitted. The HRP was requested to provide the Applicant with a complete response on or before August 11, 2008.

Due to confusion about who the HRP Freedom of Information and Protection of Privacy Administrator was during the summer, the Review Office made various contacts with the HRP trying to ascertain who was assigned as the responsible officer for Applications for Access to a Record and when a response could be expected. In early September, a meeting was held with representatives of the HRP to discuss process issues and to identify a conflict of interest raised by the Applicant. This confusion has been resolved and all contact with the HRP from that point on was with the delegated Administrator.

On September 17, 2008, an Amended Form 7 was received by the Review Office, which provided:

> *I have a Human Rights Complaint against the Halifax Regional Police with [Name of specific HRP employee] named as a Respondent. The handling of files by [Name of specific HRP employee] creates a conflict of interest.*

On September 18, 2008, the HRP issued a second decision, which provided:

> *We have considered your access request and consulted with our Information Technology Department. We have determined that old emails generally fall into two categories. Emails that exist on the current HRM system and emails that may exist only on backup tapes.*
>
> *Searching and producing emails from the backup tapes would take a considerable amount of staff time. The scope of your request would result in HRM [Halifax Regional Municipality] having to devote a staff member to the project for a number of months.*
>
> *In addition, the backup tapes are designed to provide HRM with a safeguard against a system failure, not as a method of archiving old data. Backup tapes are made periodically and do not contain all of the information that ever existed on the system. They only contain the information that was present at the time the backup was made.*
>
> *Section 468(3)(b) of the Municipal Government Act, states that, "A responsible officer shall create a record for an applicant if creating the records would not unreasonably interfere with the operation of the municipality." We have*

determined that creating records of the old emails you request would be an unreasonable burden on the municipality.
We will search our current system for records in response to your request, we will not, however, conduct a search of our backup tapes.

On October 27, 2008 the Review Office requested confirmation from the HRP that a disclosure decision regarding the "current system" emails had been made and if not, what date that decision would be made. The Review Office letter requested a response by November 6, 2008. The HRP has not responded to the Review Office and has not released any current system emails to the Applicant.

RECORD AT ISSUE

A Record has been provided by the HRP in response to the Applicant's Application for Access to a Record, which is not at issue in this Review. Only the current emails and back-up emails, the subjects of the deemed refusal, are the Record at issue.

APPLICANT'S SUBMISSION

The Applicant's representations primarily focus on providing background information surrounding the Application for Access to a Record which identifies the basis for the conflict of interest claim. They do not address either the issue of deemed refusal or the question of whether or not back-up tapes were responsive to the Application for Access to a Record.

PUBLIC BODY'S SUBMISSION

On November 6, 2008, the responsible officer for the HRP confirmed that he was not aware that the Application for Access to a Record was being processed by the Administrative Department. The Application for Access to a Record had however, been addressed to the appropriate responsible officer for the HRP.

By letter dated December 18, 2008, the HRP provided its representations to the Review Officer as part of the formal Review. The majority of the submission is with respect to the Record that had been released. It is clear in the Investigation Summary provided by the Review Office to the HRP that the issues with respect to the Record released were not at issue in this Review. These issues are irrelevant with respect to this Review, which deals with the issue of current system and back-up emails.

The portion of the HRP's submission that addresses the emails includes:

1. The task of creating records for the emails that are not currently on the system would unreasonably interfere with the operations of the Municipality;
2. An Affidavit of a HRM human resource consultant attests to the amount of work that has already been undertaken in response to this Application for Access to a Record;
3. A second Affidavit is regarding the back-up emails and does not discuss any search done for current emails.

The submission does not specifically address the "current emails" and does not mention the conflict of interest issue that was raised by the Applicant in his/her amended Form 7.

DISCUSSION:

The issues in this Review are as follows:

1. Has the HRP fulfilled its duties in accordance with s. 467 of the *Municipal Government Act*?
2. Has the HRP failed to comply with s. 469 of the *Act* with respect to seeking time extensions?
3. Why is the HRP's failure to comply with s. 469 of the *Act* considered a deemed refusal and can a deemed refusal be cured by a subsequent decision or partial decision by a public body?
4. Has a conflict of interest affected the processing of the Applicant's Application for Access to a Record?
5. Did the person who made the decisions in response to the Applicant's Application for Access to a Record have the requisite delegated authority as a responsible officer as defined by the *Act*?
6. Has the HRP inappropriately identified the Applicant as a requester to HRP employees who are not responsible for processing Freedom of Information and Protection of Privacy Applications for Access to Record?
7. Does s. 468(3)(b) of the *Act* allow the HRP to refuse access to the records that are stored electronically on back-up tapes?

Has the HRP fulfilled its duties in accordance with s. 467 of the *Municipal Government Act*?

The first issue is whether or not the HRP has fulfilled its duties to the Applicant. The purpose of the access and privacy legislation is outlined in s. 462 of the *Act,* which states:

> *The purpose of this Part is to*
>
> *(a) Ensure that municipalities are fully accountable to the public by. . .*
>
> > *(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves*

The Applicant gave the HRP an Application for Access to a Record on February 25, 2008 and no response was received within the 30 days required by the *Act.* Section 469 of the *Act* provides:

> *(1) The responsible officer may extend the time provided for responding to a request for up to thirty days or, with a review officer's permission, for a longer period if*

(a) the applicant does not give enough detail to enable the municipality to identify a requested record;
(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operation of the municipality; or
(c) more time is needed to consult with a third party or other municipality before the responsible officer can decide whether or not to give the applicant access to a requested record.

(2) Where the time is extended, the responsible officer shall tell the applicant

(a) the reason;
(b) when a response can be expected; and
(c) that the applicant may complain about the extension to a review officer.

Where a decision is not issued within the time period imposed by the statute or an extension has not been taken, the HRP is in a deemed refusal situation. Section 467(3) of the *Act* provides:

A responsible officer who fails to give a written response is deemed to have given notice of a decision to refuse to give access to the record thirty days after the application was received.

On April 10, 2008, the Applicant filed a Form 7 with the Review Office requesting a Review of the HRP's deemed refusal. The HRP eventually issued two decisions, the first nearly three months after the Application for Access to a Record was received. As a result, the HRP did not meet the statutory deadlines under the *Act.* In addition to demonstrating a blatant disregard for those statutory deadlines, the lack of rigour in responding to this Application for Access to a Record is exacerbated by the fact that the HRP did not acknowledge its failure to meet the deadlines, did not seek an extension from the Review Officer and did not keep the Applicant apprised of his/her rights under the *Act.*

The *Act* imposes a duty to assist in s. 467, which states:

(1) Where a request is made pursuant to this Part for access to a record, the responsible officer shall
(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant ***openly, accurately and completely****; and*
(b) consider the request and give written notice to the applicant of the decision with respect to the request.

(2) The responsible officer shall respond in writing to the applicant within thirty days after the application is received . . .

(3) A responsible officer who fails to give a written response is deemed to have given notice of a decision to refuse to give access to the record thirty days after the application was received.
[Emphasis added]

The *Act* stipulates what the responsible officer is required to do when an Applicant has been advised that access will be given. Section 468 provides:

> *(1) Where an applicant is informed that access will be given, the responsible officer shall*
>
> *(a) where the applicant has asked for a copy and the record can reasonably be reasonably be reproduced,*
>
> *(i) provide a copy of the records, or part of the record, with the response, or*
> *(ii) give the applicant reasons for delay in providing the record; . . .*
>
> *(2) A responsible officer may give access to a record that is microfilm, film, sound recordings, or information stored by electronic or other technological means by. . .*
>
> *(d) permitting, in the case of a record stored by electronic or other technological means, the applicant to access the record or providing the applicant with a copy of it.*
>
> *(3) A responsible officer 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 municipality using its normal computer hardware and software and technical expertise; and*
> *(b) creating the record would not unreasonably interfere with the operations of the municipality.*

Has the HRP failed to comply with s. 469 of the *Act* with respect to seeking time extensions?

In s. 469 of the *Act*, allowance for an additional 30 days is given to the responsible officer in addition to the ability to ask the Review Officer for an extension of time in which to respond. Section 469 provides:

> *(1) The responsible officer may extend the time provided for responding to a request for up to thirty days or, with a review officer's permission, for a longer period if*
>
> *(a) the applicant does not give enough detail to enable the municipality to identify a requested record;*
> *(b) a large number of records is requested or must be searched and meeting the time limit would unreasonably interfere with the operation of the municipality; or*
> *(c) more time is needed to consult with a third party or other municipality before the responsible officer can decided whether or not to give the applicant access to a requested record.*

(2) Where time is extended, the responsible officer shall tell the applicant

(a) the reason;
(b) when a response can be expected; and
(c) that the applicant may complain about the extension to a review officer.

Where a public body does not respond to an applicant within the 30 days and does not advise an applicant clearly of its intention to rely on the additional 30 days available or seek an extension from the Review Officer thereafter for any longer period, it has failed to fulfill its statutory duty to assist an applicant. In Review Report *FI-07-55*, I held that where a public body fails to respond without delay to an applicant, it is in breach of its statutory duty to assist. The same conclusion applies here.

On September 18, 2008, the HRP issued a partial decision regarding the back-up tapes and indicated an intention to search the current system. No decision regarding the disclosure of the current emails was made.

Why is the HRP's failure to comply with s. 469 of the *Act* considered a deemed refusal and can a deemed refusal be cured by a subsequent decision or partial decision by a public body?

Does a decision made by a public body after the 30 days the *Act* requires it to respond cure the deemed refusal? This question has arisen in other jurisdictions such as the cases cited below.

Previous orders have found that an interim decision/fee estimate should be issued within the initial 30 day time limit for responding to a request (Orders MO1520-I, PO-2634). Otherwise the institution would be in a "deemed refusal" pursuant to section 29(4) of the Act. Issuing an interim decision/fee estimate once the time limit has expired does not cure a deemed refusal (Orders PO-2595, PO-2634).

Other orders have found that a decision to extend the time for responding to a request should be issued within the initial 30 day time limit for responding to a request (Orders P-234, M-439, M-581, MO-1748, PO-2634) and that issuing a time extension once the time limit has expired does not cure a deemed refusal (Orders PO-1777, PO-2634).
[ON Order PO-2698]

Therefore, the decisions by the HRP that were issued well beyond the 30-day time period did not cure the deemed refusal.

Has a conflict of interest affected the processing of the Applicant's Application for Access to a Record?

The Applicant raised the issue that the person processing the Application for Access to a Record was in a conflict of interest because of that employee's involvement in a personnel matter. The Applicant filed an Amended Form 7 to formally include the allegation of bias against the HRP employee. The allegation of a conflict of interest was

raised with the HRP to which it has never responded and did not address in its representations to the Review Officer.

Conflict of interest arises when a decision-maker's private or personal interests take precedence over or compete with the decision-maker's adjudicative responsibilities. As discussed on Ontario Order MO-2227, conflict of interest may be real, perceived or potential:

> *Bias is a lack of neutrality or impartiality on the part of a decision-maker regarding an issue to be decided.* ***A decision-maker must not be biased as "no one shall be a judge in his own cause." In other words, an individual with a personal interest in the disclosure or non-disclosure of a record must not be the decision-maker who makes the determination with respect to disclosure. A breach of this fundamental rule of fairness will cause a statutory delegate to lose jurisdiction.*** *[Order M-1091]. Accordingly, there is a right to an unbiased adjudication in administrative decision-making.*
>
> *It is not necessary to prove an "actual bias". The test most commonly applied by the courts is whether there exists a "reasonable apprehension of bias". The test for a reasonable apprehension of bias enunciated by the Supreme Court of Canada is "What would an informed person, viewing the matter realistically and practically - and having thought the matter through – conclude? Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly?" [Order MO-1519]*
> *[Order MO-2227]*
> [Emphasis added]

In other words, the decision-maker in an Application for Access to a Record must be free from any personal interest in whether or not a record is released.

The Office of the Commissioner in Ontario made an Order that provides guidance through a set of questions that can be asked to ascertain whether or not the issue of bias is a legitimate problem. The questions are:

> 1. *Would a well informed bystander reasonably perceive bias on the part of the decision-maker?*
> 2. *Would the decision-maker have a closed mind, in that no representations could have been made, which could have resulted in the decision-maker making a different decision?*
> 3. *Would the decision-maker have a pecuniary interest in or relation to the records?*
> 4. *Would the decision-maker have any other kind of personal or special interest in the records?*
>
> *If any of the above questions are answered in the affirmative, please respond to the following:*
>
> 5. *Would it have been possible for someone other than the decision-maker to have made the decision?*

6. *Would the answer to any of questions 1-4, posed in regard to the alternate decision-maker(s), have been "yes"?*
7. *Would the requester and any third parties/affected persons, with the full knowledge of the relevant facts and having had the opportunity to object, waived their rights to object to the decision-maker's participation?*

[ON Order MO-1283]

It is important to note that in this case the responsible officer would be required to exercise his discretion as to whether or not to release the email portion of the Record. This heightens the importance of ensuring the decision-maker does not have a conflict of interest.

The HRP has allowed an employee of the HRP who does not have the delegated authority under the *Act* and who is and has been involved in a relevant personnel matter (involving the Applicant) to make a decision about an Application for Access to a Record concerning employment information. The decision by this non-authorized individual was not supervised by the responsible officer of the HRP who does have delegated authority. The average person knowing this would find this approach inappropriate and unprofessional. It would be impossible for the decision-maker named in the Application for Access to a Record about personnel information, against whom the allegation of bias has been raised, to deal with the Applicant in an impartial, open and transparent manner given the potential for his/her self-interest to be served by non-disclosure of the requested information.

Did the person who made the decisions in response to the Applicant's Application for Access to a Record have the requisite delegated authority as a responsible officer as defined by s. 461(i) of the *Act*?

Section 461 of the *Act* provides the definition of responsible officer:

(i) "responsible officer" means, in the case of a

(i) regional municipality, town or county or district municipality, the chief administration officer, if one has been appointed, or, if one has not been appointed, the clerk

A responsible officer can delegate his or her authority to another person but such a delegation must be in accordance with s. 497 of the *Act,* which provides:

(1) The responsible officer may delegate to one or more officers of the municipality a power granted to, or a duty vested in, the responsible officer.

(2) A delegation

(a) shall be in writing; and
(b) may contain any limitations, restrictions, conditions or requirements that the responsible officer considers necessary or advisable.

The responsible officer for the HRP has confirmed that the person who actually processed the Applicant's Application for Access to a Record and eventually provided two decision letters does not have delegated authority as the responsible officer under the *Act.* This situation could easily have been solved had the responsible officer processed this Application for Access to a Record and had the other employee, who had no authority to make a decision under the *Act* and against whom the conflict of interest was raised, stepped aside and not been involved in this Application for Access to a Record.

Has the HRP inappropriately identified the Applicant as a requester to HRP employees who are not responsible for processing Freedom of Information and Protection of Privacy Applications for Access to a Record?

It became apparent during the Review process that the identity of the Applicant had been shared with other employees beyond the responsible officer. The unauthorized person who processed the Application for Access to a Record involved other people in the human resources department in a manner contrary to the *Act* and the HRP's duty to the Applicant.

In processing the Application for Access to a Record, while others may need to be involved in such duties as searching and copying, every effort should be made to protect the privacy of the Applicant and to maximize the objectivity of the decision-making process. The identity of the Applicant is irrelevant, other than how it relates to the exemptions that might apply, and should be kept confidential to the extent possible throughout the process.

Does s. 468(3)(b) of the *Act*, allow the HRP to refuse access to the records that are stored electronically on back-up tapes?

There are two issues with respect to the email portion of the Record that the HRP continues to fail to provide to the Applicant. The HRP initially and on several occasions subsequently indicated to the Applicant that s/he would be given a copy of the emails including those stored electronically on back-up tapes. The standard practice with respect to Records, which includes emails, is that once an Application for Access to a Record has been received by a public body, all responsive records, in this case emails, that exist as of the day of the Application for Access to a Record are to be saved. The practice applies even if the records were destined for destruction in the ordinary course. This is in accordance with the Nova Scotia's *Procedures Manual – FOIPOP (2005).*

For those emails that have been stored on back-up tapes prior to the Application for Access to a Record [Form 1] date, the standard is distinctly different. Back-up tapes are for recovery purposes only and at this time are not considered a primary record. Back-up systems are designed to re-establish entire systems in the event of a systems catastrophe and are not set up or intended to be a means of retrieving individual emails. The British Columbia Commissioner agrees with that analysis regarding back-up emails and has held that it is not part of a reasonable effort to respond because a public body's:

> *duty does not extend to retrieving deleted email messages.*
> *[BC Order 02-25]*

Therefore, emails that are only stored on back-up tapes are not considered a responsive record to an Application for Access to a Record that includes a reference as in the case of this Form 1, which read in part:

> *and any other documented material including e-mails (sent, received, deleted, forwarded and archived)*

The HRP's submission that to locate back-up emails would unreasonably interfere with its operations has no applicability in this case. There may, however, be some confusion on the part of the HRP with respect to back-up tapes and archived emails. Back-up tapes, as discussed above, are not considered responsive and need not be searched while archived emails are a responsive record and do need to be searched. The HRP's duty does extend to making a reasonable effort to retrieving archived emails; its response following this Review Report's recommendations should include a search for archived emails.

The HRP, however, has yet to make a decision with respect to the emails on the current system. Notwithstanding the HRP's representation to the Applicant that it was in the process of preparing the email portion of the Record for him/her, there is no evidence before me or the Review Office to indicate that any search has been commenced or attempted by the HRP since the Form 1 was received over 10 months ago. The HRP needs to make a decision regarding the Applicant's Application for Access to a Record for all emails sent, received, deleted and forwarded that are still on the current system. In addition, the HRP must provide access to any emails that have been archived, subject to any exemptions that may apply. If any emails were deleted since the Form 1 was received and are only available on the back-up tapes, such an action on the part of the HRP could be viewed as malicious and consistent with the alleged conflict of interest. These emails which would have been on the current system the day the Form 1 was received but were then deleted should be searched and retrieved.

The responsible officer should make every effort to satisfy himself as to what emails are responsive to this email request and provide those, subject to applicable exemptions, to the Applicant. In summary, the day the access request is received essentially "freezes the system" such that the emails that are responsive and form the Record are all emails on the current system the day the request arrives [including those anyone deleted on or after that day] and all emails that have been archived. What the Record does not include are any emails on back-up tapes [unless they were on the system the date the access request was received] and any emails on the current system that were created subsequent to the Form 1 being received.

FINDINGS:

1. The HRP's failure to meet the statutory timelines has resulted in a deemed refusal to the Applicant;
2. The HRP did not comply with its statutory duty to assist the Applicant and, in particular, misled the Applicant initially about the emails it was prepared to release, did not seek a time extension from the Review Officer, did not advise the Applicant of his or her right to Request a Review of time extensions and has yet to release the email portion of the Record to which s/he is entitled;

3. The responsible officer did not process Application for Access to a Record;
4. The person who did process the Application for Access to a Record did not have the delegated authority to make a decision under the *Act*;
5. The HRP representative who made the decisions was in a conflict of interest; perceived or potential because of the position s/he holds in relation to the Applicant;
6. The HRP has never responded to the allegation of being in a conflict of interest and it was not addressed in its representations to the Review Officer;
7. The identity of the Applicant was inappropriately disclosed to others within the HRP who were not the responsible persons to process the Application for Access to a Record;
8. The Applicant is entitled to confidentiality through the course of the Application for Access to a Record being processed. His or her identity should only be disclosed to those persons responsible for processing the Application for Access to a Record;
9. After more than ten months since the Form 1 was received by the HRP, the responsible officer at the HRP has still not made a decision with respect to current emails;
10. The Applicant is not entitled to any back-up emails, save and except for any emails that were on the current system when the Form 1 was received and were deleted and are on back-up;
11. The search for the Record should include any emails that have been archived;
12. The Applicant is not entitled to any emails on the current system that were sent, received, deleted, forwarded or archived after the date the Form 1 was submitted.

RECOMMENDATIONS:

I recommend the following to the HRP:

1. The responsible officer make a decision regarding the current system emails [including any improperly deleted] and provide immediate access to the Applicant in accordance with the *Act;*
2. The responsible officer re-affirm the decision not to grant access to the emails found on back-up tapes, with the exception of any that may have been inappropriately deleted once the Form 1 was submitted;
3. The HRP revamp its system of processing Applications for Access to a Record to ensure greater compliance with statutory timelines in which to respond to applicants;
4. The HRP ensure that only those with a properly executed delegated authority have access to information about applicants and Applications for Access to a Record.

Respectfully,

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