REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-08-35/FI-08-54

Report Release Date: December 3, 2009

Public Body: Department of Community Services

Issues: Whether the Department of Community Services ["*Community Services*"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether the information withheld is "personal information" under the *Act*.
2. If yes, whether Community Services is required to sever the information as its release would constitute an unreasonable invasion of personal privacy.
3. Whether s. 16 allows Community Services to sever information from the Record.
4. Whether Community Services properly exercised its discretion under s. 16 of the *Act*.
5. Whether the information included in the disclosure decisions was open, accurate and complete in accordance with the duty to assist.

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 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. In FI-08-35 the Record under Review is one document, a running record related to the Applicant created by Community Services. In FI-08-54 the Record is composed of four documents: two emails, another document and the running record at issue in FI-08-35. As a result of the duplication of the Record under consideration in the latter, the two matters were reviewed together.

Findings:

1. As a result of the four decisions and four releases of parts of the Record, I find Community Services has provided the Applicant with generous access by:

a. Only severing the documents where it has relied on the solicitor-client privilege exemption rather than withholding them in full. [pages 6 and 9]

b. Only severing under s. 20 of the *Act* to very specific information while at the same time releasing employee names even though Community Services believes that in accordance with *FI-06-69* they could have withheld them under s. 18.

2. With respect to employees of banking institutions, these names do not fall within the definition of personal information and can be released [pages 1, 2, 10, 12 and 13].

3. The personal information of the other third party is personal information within the definition of the *Act* and was appropriately severed by Community Services. Section 20(3)(c) establishes a presumption of an unreasonable invasion if the information relates to a third party's eligibility for social assistance. No Representation was received from the Applicant to meet the onus to demonstrate release of the third party's personal information would not result in an invasion of personal privacy [page 5].

4. Community Services has been subjected to repeated demeaning and condescending language from the Applicant particularly in relation to the department's abilities in processing an Application for Access to a Record. This is wholly inappropriate and should not be tolerated as behaviour inconsistent with and prohibited by the *Respectful Workplace Policy* ["*Policy"*] that applies to all provincial government workplaces. The Review Office has a practice that if any applicant through his or her behaviour does not comply with the *Policy,* in order to preserve the wellbeing of all employees, access to the Review Office will be restricted. In the opinion of the Review Office, were a public body to adopt a similar policy, such a policy would not be considered inconsistent with the duty to assist under the *Act.*

5. Whether or not a public body has met its duty to assist is an issue that can be raised by an Applicant on his or her Form 7, in his or her Representations or by the Review Office, where appropriate. Throughout this Application for Access to a Record, it appears that this Applicant has presented him/herself in such a manner as to make it nearly impossible for Community Services to meet all of his/her demands. In such circumstances, applicants must

realize that under the legislation they too bear some burden to show that the release of personal information of third parties would not be unreasonable. Applicants also have a responsibility for being reasonable and respectful including the duty to provide sufficient particulars to identify the Record. The public body under s. 7 of the *Act* – the duty to assist – has to make every reasonable effort to be open, accurate and complete. I find that, in the circumstances of this case, Community Services has more than met its duty to assist in this case.

Recommendations:

1. Community Services release a copy of the Record as requested by the Applicant with the names of employees of banks included but with the personal information of the other third party severed.
2. Community Services re-confirm its decisions to withhold the personal information of one third party and the information for which solicitor-client privilege has been claimed.

Post Note:

The public body in this case is Community Services. As part of its Representations, Community Services has appropriately argued that this case demonstrates the need for a provision with respect to trivial, frivolous, vexatious or not made in good faith use of the *Act*. This would require an amendment to the *Act* to enable administrative decision-makers including the Review Office to refuse a Request for Review or a complaint where there is clear evidence that the request or complaint is trivial, frivolous, vexatious or not being made in good faith. This type of discretionary provision is typical in ombudsman legislation including in Nova Scotia. It is a proposed provision in the new draft *Personal Health Information Act* for both FOIPOP Administrators and the Privacy Review Officer. A copy of this Review Report is being shared with the Department of Justice to request that it give strong consideration to proposing such an amendment in any future legislative review of the governing access and privacy statutes to grant this important discretionary provision.

Key Words:

broad and liberal, business identity information, contact information, employees, exhaustive, frivolous, not made in good faith, personal information, precedent, running record, solicitor-client privilege, trivial, unreasonable invasion of personal privacy, vexatious.

Statutes Considered:	*Freedom of Information and Protection of Privacy Act, ss. 2, 3(1)(i), 5, 7, 16, 20; Ontario Freedom of Information and Protection of Privacy Act, s. 2(3); Personal Information Protection and Electronic Documents Act.*
Case Authorities Cited:	*FI-08-12; Dickie v. NS (Department of Health), [1999] NSCA 7239; FI-08-66; FI-07-58; FI-06-69.*
Other Cited:	Nova Scotia Government's *Respectful Workplace Policy.*

REVIEW REPORT FI-08-35/FI-08-54

PRELIMINARY NOTE:

Community Services made a Representation that because the only document forming the Record in FI-08-35 was also one of the documents responsive in FI-08-54, that the matters be processed under one file. I agree with this approach and for the purpose of the formal Review, I will consider these matters together.

BACKGROUND: FI-08-35

On February 27, 2008 the Applicant made an Application for Access to a Record to Community Services for the following Record:

running record [of Applicant]

On May 2, 2008, Community Services made a decision [Decision #1 A] with respect to the Application for Access to a Record:

> *Access is being granted in part to this information. Section 20 (1) 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. As a result, information falling into this category has been severed from the documents prior to disclosing them to you.*

On May 12, 2008**,** the Applicant's Request for a Review dated May 6, 2008 was received, which request provides:

> *The applicant requests that the review officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record . . .*
>
> *when you do a full investigation as your [sic] very well paid to do as Nova Scotia's FOIPOP Act Review Officer, you will be able to see that 100% of "running record" was not just "granted in part," as [FOIPOP Administrator] is now just doing!*

On May 29, 2008, the Review Office requested the Applicant clarify the issue(s) of his/her Request for Review. On June 2, 2008, the Applicant provided a detailed letter, the essence of his/her response reading as follows:

> *I needed to make the "Freedom of Information and Protection of Privacy Act" applications, "so I could be "fully disclosed" "all" "personal information" being controlled by our Tory run "Department of Community Services Offices" throughout Nova Scotia "electronic" or "otherwise", without censorship whatsoever in order to pursue "justice" being denied, by the "courts actions" still ongoing!*

After notifying Community Services of the Request for Review, on June 5, 2008, the Review Office confirmed the only issue in the Review is:

> *. . . the Applicant's issue contained in [his/her] Form 7 to our office is the severing of information in accordance with s. 20 of the Act and that our investigation into this matter will focus solely on this issue.*

On February 7, 2009, the Review Office invited Community Services to reconsider its decision with respect to severing on the basis that the severed information fell into two categories: contact information of individuals at their place of business and the names of other individuals who are known to the Applicant.

On February 25, 2009, in response to a request to reconsider its decision, Community Services provided a Representation, details of which will be included below in the Public Body's Representations. This Representation accompanied a second decision [Decision #2 A] made by Community Services, which read as follows:

> *The Department has reviewed the records disclosed in the letter of May 2, 2008, and as part of the Review Process, we are disclosing further information specifically information related to individuals with a position in either federal government or associated organizations as well as names of your legal representative and immediate family.*

Community Services maintained its reliance on s. 20(1) of the *Freedom of Information and Protection of Privacy Act* ["*Act*"] to withhold contact information of individuals performing their functions as business people. A copy of the newly severed Record was provided to the Applicant. The Applicant sought an explanation from the Review Office regarding this release, which was provided to him/her on March 16, 2009.

On June 1, 2009, the Review Office communicated with the Applicant to specifically inform him/her that if it is determined that the information severed from the newly released copy of the Record is considered personal information, as claimed by Community Services, the burden rests with him/her to demonstrate that it would not constitute an unreasonable invasion of anyone's personal privacy for that information to be released to him/her.

BACKGROUND: FI-08-54

On June 16, 2008, the Applicant made an Application for Access to a Record to Community Services, which was received on July 7, 2008, for the following Record:

> *I [Applicant's name] . . . make this Freedom of Information and Protection of Privacy Act application to be totally updated on the [sic.] 100% of personal information that has been collected by any divisional office of our Department of Community Services from across this Canadian Province of Nova Scotia. Precisely I wish to view all electronic or otherwise information that has been compiled from my previously filed FOIPOP Act request . . .*

On July 25, 2008, Community Services made a decision [Decision #1 B] with respect to the Application for Access to a Record:

> *Previous to this request (COM-08-10), you have been provided with records up to and including January 23, 2008. Therefore, the search for records in response to this request was restricted to information placed in your file from January 23, 2008 to July 15, 2008.*
>
> *Access is being granted in part to this information. Four pages containing information subject to solicitor-client privilege are being withheld pursuant to s. 16 of the Act. The sensitive personal information of named individuals is being withheld pursuant to s. 20 of the Act.*

On August 5, 2008, the Applicant's Request for a Review dated July 30, 2008 was received, which request provides:

> *The applicant requests that the review officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record without criminal censorship.*

On June 9, 2009, the Review Office invited Community Services to reconsider its decision with respect to severing on the basis that the severed information fell into two categories: contact information of individuals at their place of business may not fall within the definition of personal information and information for which solicitor-client privilege had been claimed may not fall within the generally accepted categories to constitute privileged information.

On June 29, 2009, after a request from the Review Office to reconsider its decision, Community Services made a new disclosure and a new decision [Decision #2 B], which reads as follows:

> *The Department has reviewed the records disclosed to you in response to this application on July 25, 2008. This file is as you know currently under review by the Review Office. As part of the Review Process, we are disclosing further information, specifically information related to individuals with a position in either federal government or associated organizations as well as names of your legal representative and immediate family.*
>
> *We are also providing you with 4 pages that were previously withheld in full under S. 16 of the Act. The pages are now being provided to you. Information has been severed from the 4 pages pursuant to s. 16. The department believes that the information that has been severed would reveal confidential discussions and the provision of advice between the department and its solicitor.*

The Applicant has repeatedly asked the Review Officer to consider all of his/her many other Requests for a Review as one because they are all inter-related. That is not possible and would be inappropriate under the legislation. In this case, where one document

was the sole Record in one Review and was also a responsive Record in the second Review, it is wholly appropriate to consider the matters together.

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 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.

In FI-08-35 the Record under Review is one document, a running record related to the Applicant created by Community Services. In FI-08-54 the Record is composed of four documents: two emails, another document and the running record at issue in FI-08-35. As a result of the duplication of the Record under consideration in the latter, the two matters were reviewed together.

APPLICANT'S REPRESENTATION

The Applicant has provided virtually no information that constitutes a Representation. S/he has provided a lot of background information on the reason for requesting the Record, though for the purposes of the Review process, why an applicant wants access to particular information is irrelevant. The Applicant also refers to other issues that are of an ongoing concern, some related to Community Services and some related to other public bodies, but none of which relate to the issues under Review.

The Applicant has been advised on numerous occasions that the burden of proof with regard to s. 20 rests with him/her as part of the Review. First a public body must establish that the requested information falls within the definition of personal information and then it has to determine that the release would be an unreasonable invasion of privacy. Thereafter, the burden of proof or onus shifts to the Applicant to demonstrate that the release of a third party's personal information would not be an unreasonable invasion of his/her privacy. While no Representations on this specific issue were provided by the Applicant, under my duty to be fair, I will analyze this issue as it is central to the Review.

PUBLIC BODY'S REPRESENTATIONS

In response to the Review Office's request to reconsider its decision, on February 25, 2009, Community Services made the following Representation in FI-08-35 along with notice that they would be disclosing additional information to the Applicant. This Representation was referentially incorporated it in FI-08-54 in its June 29, 2009 Representation detailed below. The February 25, 2009 Representation included:

1. The *Act* like the BC *FOIPOP Act* applies only to provincial government public bodies. [The research provided by the Review Office for Community Services' consideration included the definition of personal information from the BC *FOIPOP Act*.]

2. The *Act* is similar to the BC *FOIPOP Act* but this province is governed by the *Act* and we must look at information based solely on that legislation.
3. The *Act* does not have a definition for "contact information" like the BC statute does. We must, therefore, look at personal information in the context of the Nova Scotia legislation. Community Services usually takes into consideration the definition of "employee."
4. The BC statute only has jurisdiction over information held by public bodies therefore its definition of "contact information" can only apply to individuals in a working relationship with public bodies and would not apply to individuals working for private institutions.

On June 29, 2009, Community Services responded to correspondence from the Review Office in FI-08-54 in which each of the issues in the Review had been thoroughly canvassed. Community Services also indicated additional information had been provided to the Applicant.

1. The rationale for refusing to disclose the names of individuals contacted by Community Services was reiterated by making reference to a letter dated February 25, 2009, sent on another Review file [FI-08-35] in which the Record was the same as the one at issue in this file.
2. Reference was made to Review Report *FI-06-69*.
3. Subsection 20(3)(c) establishes a presumption that disclosure of personal information about a third party relating to eligibility for income assistance would constitute an unreasonable invasion of privacy. It is irrelevant if the Applicant happens to know these details. The presumption prevents Community Services from releasing this information.
4. Part of the new information released included information previously withheld in full under s. 16 of the *Act,* but which now was released in severed form, severing only those portions where advice was sought or given.
5. With respect to its duty to assist, Community Services indicates that in the circumstances with respect to this Applicant, it has done the best it can in relation to the repetitive and often very unclear requests from the Applicant. Community Services indicates the Applicant can be rude, insulting and uses inappropriate language with respect to those responsible for processing his/her requests for the Department. Community Services laments that there is no provision in the *Act* to refuse to process an Application for Access to a Record where the request is frivolous or vexatious. However, they suggest the Review Officer has an obligation to look at the whole picture and take into consideration the Application, its reasonableness, the response from the public body and the history and the precedents existing with this Applicant. Community Services feels that only when there is an equal and fair application of the legislation, to all parties involved, will any public body be able to meet the true spirit of the law.

On October 2, 2009, Community Services made a Representation to the Review Office after receiving the Investigation Summary, which contained the research for both files. The Representation can be summarized as follows:

1. One of the documents is the same document [running record] for both Reviews. For that reason, Community Services believes to avoid confusion that file should be closed and only one Review proceed.
2. The issue of duty to assist was raised by the Review Office in correspondence dated June 9, 2009. Community Services had concerns about this issue being raised in these circumstances and in fact there is no mention of whether or not Community Services responded openly, accurately and completely on the Applicant's Form 7.
3. The scope of the Review should be limited to the issue of the severing of information.
4. Notwithstanding the Applicant's use of derogatory and insulting language in correspondence with the Department, Community Services responded in an open, accurate and timely fashion.
5. The public body believes the Review should consider the prior decision from the Review Office *FI-06-69.*

On October 26, 2009, Community Services provided its Representation as part of the formal Review process. The Representation is summarized as follows:

1. Community Services reviewed the history of the decisions and the releases for both files FI-08-35 and FI-08-54.
2. With respect to s. 16 [solicitor-client privilege], Community Services argues that the information severed clearly meets the test outlined in *FI-05-08* and that it has appropriately exercised its discretion to withhold the information. The parts to the test met in this case include that it is a written communication between a staff person and a Departmental lawyer, the communication was of a confidential nature, it was between a client and a legal advisor and the communication directly related to seeking, formulating or giving legal advice.
3. Community Services confirms that on a number of occasions it has provided the Review Office its rationale for not releasing the names of individuals at their place of business [Refers to letters dated February 25, 2009 and June 29, 2009]. Through its *Employment Support and Income Assistance Form, Consent to Release & Obtain Information Authorization,* Community Services obtains the consent of the Applicant in order to solicit information from sources to determine eligibility for income assistance. Community Services submits that the names of the individuals it spoke to is irrelevant and that all that is relevant for the Applicant to know is what institution and what financial information was obtained in order to determine the Applicant's eligibility.
4. Community Services references protocols put in place in public and private organizations to manage the way the Applicant is permitted to interact. This has come as a result of the disrespect shown towards those working for these agencies both at their workplace and outside of their place of work.
5. Community Services cites again Review Report *FI-06-69* that was in regards to the Department of Justice. It cites *FI-06-69* for the authority to withhold the names of public servants. In this case, however, Community Services submits it has not followed suit but rather has released the names of public servants both provincial and federal. Though it did not cite s. 18 of the *Act,* Community

Services indicates that it did consider the safety issue when determining whether there would be an unreasonable invasion of personal privacy under s. 20.

6. The information about one of the third parties is his/her personal information about eligibility for income assistance and if released would constitute a breach of his/her privacy, as presumed under s. 20(3)(c).
7. With respect to the duty to assist, Community Services states it has responded to the Applicant in an open, accurate and timely fashion and refers to its previous concerns expressed in its June 29, 2009 and October 2, 2009 correspondence as part of its Representations.
8. Community Services refers to the history of the requests made over the last ten years and the Applicant's nearly 80 Applications for Access to a Record to Community Services. In particular, reference is made to the Applicant's derogatory, threatening and insulting language towards staff. Notwithstanding this harassment, as a public body there is no ability to refuse the applications on the basis they may be frivolous or vexatious. As a result, Community Services responds openly and accurately, though regardless of how it responds, Community Services believes the Applicant will never be satisfied with the information provided to him/her. Community Services bases its position on statements made to it by the Applicant that it is his/her intention to bring the workings of government to a halt by inundating public bodies with requests. Community Services submits that by raising the duty to assist it is compounding the problem and enabling the Applicant to continue his/her insulting and threatening comments. This Applicant's volume of requests and behaviour is not consistent with the purpose of the legislation and impacts on those whose intent to access information for the purpose of ensuring accountability and to understand decisions that have been made so that there can be informed public participation.

ISSUES

1. Whether the information withheld is "personal information" under the *Act*.
2. If yes, whether Community Services is required to sever the information as its release would constitute an unreasonable invasion of personal privacy.
3. Whether s. 16 allows Community Services to sever information from the Record.
4. Whether Community Services properly exercised its discretion under s. 16 of the *Act*.
5. Whether the information included in the disclosure decisions was open, accurate and complete in accordance with the duty to assist.

DISCUSSION

The purpose of the *Freedom of Information and Protection of Privacy Act* ["*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; and

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

(ii) ensure fairness in government decision-making, . . .

(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.

The *Act* provides the public with a right of access to information.

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.

Community Services made a total of four decisions in this matter, referred to above, and provided the Applicant with four releases of information [with some duplication]. Community Services relied on two exemptions to refuse access to some of the information in the Record: s. 16 and s. 20.

SECTION 20 - PERSONAL INFORMATION EXEMPTION

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 refer to *FI-08-12*] and the principles and the approach for its application are well established. I have applied those principles here without repeating them.

After Community Services' second decisions, some of the information at issue was the names and positions of individual employees at federally regulated organizations [banks]. Community Services argues that it should not release names of individuals at their place of business.

The s. 3 definition of what constitutes personal information is not exhaustive; in other words, "including" means just that. The definition lists the kinds of information

that are included but does not provide a definitive list in the same way as if the definition had included the word: "means" or "is".

> *In my opinion, the examples (set out in (i) through (ix) of the definition) illustrate, but do not limit the breadth of the definition set out in the opening words. [Dickie v. NS (Department of Health), [1999] NSCA 7239] [Emphasis in original]*

Our Nova Scotia Supreme Court and all other Canadian jurisdictions have held that the definition in the governing legislation is not exhaustive and that the definition should be given broad and liberal interpretation. In determining what other information may fall within the definition, it is completely appropriate for FOIPOP Administrators and the Review Office to consider precedents from other jurisdictions with similar or the same legislation. It is wholly appropriate and the way in which the law evolves and develops in Canada, to build on precedent from both within Nova Scotia and other Canadian and common law jurisdictions.

In a recent Review Report, *FI-08-66*, in determining whether or not applicants could have their fees waived by virtue of the information being requested falling within the definition of personal information, I stated:

> *There may be some recorded information about the Applicants as identifiable individuals falling within the definition above but the information may be only be [sic.] contact information. Schedule 1 of the British Columbia Freedom of Information and Protection of Privacy Act defines personal information as excluding "contact information" and defines "contact information" as:*
>
> > *Information to enable an individual at a place of business to be contacted and includes the name, position name or title, business telephone number, business address, business email or business fax number of the individual.*
>
> *. . . Individuals seeking information about themselves in their role as executives of corporate interests cannot try to avoid the costs associated with an Application for Access to a Record by characterizing the information as "personal" as defined by the Act.*

Likewise in Ontario, personal information has been defined so as to not include business identity information.

> *2(3)"Business Identity Information:" Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.*

These definitions are both consistent with the way personal information is defined in the federal *Personal Information Protection and Electronic Documents Act* ["*PIPEDA*"].

"personal information" means information about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.

Ontario's and British Columbia's exclusion of "contact information" in their definitions, lines up with the average person's expectations of privacy under *PIPEDA* and works towards consistency across sectors. People working in the private sector do not have an expectation of privacy of information such as their name and business title because of *PIPEDA*. It would create a double standard to consider this information personal information under provincial legislation by applying it to a public sector organization, while it does not fit the definition in the federal legislation. I find that by giving a broad and liberal interpretation of what fits within the definition of personal information and reflecting on what other jurisdictions have said in relation to this issue, the names and titles of employees from within federal banking institutions do not fall within the definition of "personal information." It is unnecessary under the *House* decision to decide if release of the information would constitute an unreasonable invasion of personal privacy. The fact that the Applicant did not address the latter issue in his/her Representations, therefore, is not relevant as the first step in the test has ended the inquiry.

Community Services had the consent of the Applicant to contact the third parties employed at the banks with a view to determining eligibility for income assistance. Community Services contacted the third parties for that specific purpose. The public body submits that the names of the individuals it spoke to is irrelevant and that all that is relevant is the financial information obtained. This, with respect, misses the point. The Application for Access to a Record is not about the process for applying for income assistance. It is simply to provide a copy of the responsive Record held by the public body. The Applicant is entitled to any information in the Record, unless appropriately severed under the statutory exemptions, whether or not the information is relevant to the process at Community Services *vis a vis* income assistance eligibility.

In addition, a public body cannot claim an exemption based on what it considers to be the motivation behind the Application for Access to a Record. The "why" underlying an Application for Access to a Record is irrelevant and should not be considered even if known by the public body.

In the case of information that can be described as the income assistance assessment, contained in the Record [page 5], this does fall within the definition of personal information of a third party. Community Services demonstrated that the information did fall within the definition and the presumption of constituting an invasion of personal privacy because it directly discusses a third party's eligibility for income assistance. There was no Representation received from the Applicant to refute the presumption and therefore, Community Services' decision should stand.

SECTION 16 - SOLICITOR-CLIENT PRIVILEGE EXEMPTION

Section 16 of the *Act* reads as follows:

> *16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.*

It is clearly established what conditions must be present for the solicitor-client exemption to possibly apply, remembering it is a discretionary exemption, so a public body may choose to rely or not to rely on the exemption. In *FI-08-06* I discussed the application of s. 16 and I have applied that decision and other decisions from this Office without elaboration.

On a careful review of the pages [pages 6 and 9] where information has been severed on the basis of s. 16 of the *Act,* I find that Community Services has appropriately relied on s. 16. The information severed clearly relates to the Community Services seeking and receiving advice from its solicitor.

SECTION 7 - DUTY TO ASSIST

During the Review process, the issue of duty to assist was raised. This is a statutory requirement governing how a public body responds to an applicant. The section entitled "Duty of head of public body" reads as follows:

> *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*
> > *(b)either*
> >
> > > *(i) consider the request and give written notice to the applicant of the head's decision with respect to the request in accordance with subsection (2), or*
> > > *(ii) transfer the request to another public body in accordance with Section 10.*

Community Services is correct in asserting that this issue was not raised by the Applicant. It is, however, open to the Review Office to raise matters regarding duty to assist regardless of whether it has been raised by an Applicant or on a Form 7 [refer to *FI-07-58*]. The ability to do so is extremely important as this case points out.

Given that Community Services issued subsequent decisions and made subsequent releases, this could on its face invite the Review Office to consider the issue of duty to assist. I find, however, there to be no evidence that Community Services failed in its duty to assist to the Applicant under the *Act.* In fact, in these circumstances given

the barrage of derogatory and insulting statements made towards employees, Community Services responded in a respectful and timely fashion.

Community Services referred to a Recommendation from Review Report *FI-06-69*, in which the Review Officer claimed that s. 18 could be applied, although it was not cited by the public body [Department of Justice]. In that case it could apply because the release of the names of civil servants would be an unreasonable invasion of personal privacy for health and safety reasons. Although apparently agreeing with the Recommendation, Community Services has agreed to release names of civil servants to the Applicant in this case. I applaud Community Services for releasing the names of the provincial and federal public servants as being a decision consistent with the legislation as to do so would not constitute an unreasonable invasion of personal privacy. With respect to *FI-06-69,* I believe there was an error in the application of the legislation and that Report will not be relied upon as a precedent that s. 18 should be interpreted in concert with s. 20 in this fashion, particularly where s. 18 had not been claimed by the public body. This is an inappropriate way to restrict an applicant's access to information. It should be noted that the use of the health and safety exemption should be reserved for only those situations where the connection between disclosure and the anticipated threat can be demonstrated.

While this Review Officer does not approve of the approach taken in *FI-06-69,* where a blanket restriction was placed on a particular applicant, I do consider it appropriate, on a case-by-case basis to limit interactions between public bodies, including the Review Office, and any applicant who behaves in a manner inconsistent with the Nova Scotia Government's *Respectful Workplace Policy* ["*Policy"*]. That *Policy* provides, in part, as follows:

> *The Government of Nova Scotia is committed to a healthy, safe and supportive workplace and is committed to provide a work environment that values diversity and* ***where all persons are treated with respect and dignity. It is the right of all employees to work in an environment free from harassment,*** *sexual harassment, and discrimination.*
>
> *Harassment, sexual harassment, and discrimination (offensive behaviour) affect the workplace and the well-being of individuals* ***and will not be tolerated . . . .***
>
> ***Harassment refers to derogatory (e.g., condescending, insulting, belittling) or vexatious (e.g., aggressive, angry, antagonistic) conduct or comments that are known or ought reasonably to be known to be offensive or unwelcome. Harassment includes, but is not limited to, the following:***
>
> ***Actions or comments that are directed at no person in particular but that create an intimidating, demeaning or offensive work environment;***
>
> ***any objectionable comment, act, or display that demeans, belittles, or causes personal humiliation or embarrassment, and any act of intimidation or threat***

> *. . . The Government of Nova Scotia is committed to provide a workplace that is free from offensive behaviour.* ***This extends to circumstances where an employee is subject to offensive behaviour*** *. . .* ***by clients/customers*** *. . .*
>
> *The manager or person in authority shall consider what, if any, procedures and safe work practices are appropriate at the workplace to minimize or control offensive behaviour by clients/customers.*
> ***[Emphasis added]***

It should also be noted that the Review Officer does not have the authority to close files once a Request for Review has been received which contains reviewable issues that have not been resolved, without the action of the Applicant.

Also, when relying on precedence it should relate only to the similarities to the matter(s) at hand, not the fact that it is the same applicant. Each Application for Access to a Record should be assessed on its own merits, not on the identity of an applicant.

FINDINGS

1. As a result of the four decisions and four releases of parts of the Record, I find Community Services has provided the Applicant with generous access by:

    a. Only severing the documents where it has relied on the solicitor-client privilege exemption rather than withholding them in full. [pages 6 and 9].
    b. Only severing under s. 20 of the *Act* to very specific information while at the same time releasing employee names even though Community Services believes that in accordance with *FI-06-69* they could have withheld them under s. 18.

2. With respect to employees of banking institutions, these names do not fall within the definition of personal information and can be released [pages 1, 2, 10, 12 and 13].
3. The personal information of the other third party is personal information within the definition of the *Act* and was appropriately severed by Community Services. Subsection 20(3)(c) establishes a presumption of an unreasonable invasion if the information relates to a third party's eligibility for social assistance. No Representation was received from the Applicant to meet the onus to demonstrate release of the third party's personal information would not result in an invasion of personal privacy [page 5].
4. Community Services has been subjected to repeated demeaning and condescending language from the Applicant particularly in relation to the department's abilities in processing an Application for Access to a Record. This is wholly inappropriate and should not be tolerated as behaviour inconsistent with and prohibited by the *Policy* that applies to all provincial government workplaces. The Review Office has a practice that if any applicant through his or her behaviour does not comply with the *Respectful Workplace Policy,* in order to preserve the wellbeing of all employees, access to the Review Office will be restricted. In the opinion of the Review Office, were a public body to adopt a similar policy, such a policy would not be considered inconsistent with the duty to assist under the *Act.*

5. Whether or not a public body has met its duty to assist is an issue that can be raised by an Applicant on his or her Form 7, in his or her Representations or by the Review Office, where appropriate. Throughout this Application for Access to a Record, it appears that this Applicant has presented him/herself in such a manner as to make it nearly impossible for Community Services to meet all of his/her demands. In such circumstances, applicants must realize that under the legislation they too bear some burden to show that the release of personal information of third parties would not be unreasonable. Applicants also have a responsibility for being reasonable and respectful including the duty to provide sufficient particulars to identify the Record. The public body under s. 7 of the *Act* – the duty to assist – has to make every reasonable effort to be open, accurate and complete. I find that, in the circumstances of this case, Community Services has more than met its duty to assist in this case.

RECOMMENDATIONS

I make the following Recommendations:

1. Community Services release a copy of the Record as requested by the Applicant with the names of employees of banks included but with the personal information of the other third party severed.

2. Community Services re-confirm its decisions to withhold the personal information of one third party and the information for which solicitor-client privilege has been claimed.

Respectfully,

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

POST NOTE

The public body in this case is Community Services. As part of its Representations, Community Services has appropriately argued that this case demonstrates the need for a provision with respect to trivial, frivolous, vexatious or not made in good faith use of the *Act*. This would require an amendment to the *Act* to enable administrative decision-makers including the Review Office to refuse a Request for Review or a complaint where there is clear evidence that the request or complaint is trivial, frivolous, vexatious or not being made in good faith. This type of discretionary provision is typical in ombudsman legislation including in Nova Scotia. It is a proposed provision in the new draft *Personal Health Information Act* for both FOIPOP Administrators and the Privacy Review Officer. A copy of this Review Report is being shared with the Department of Justice to request that it give strong consideration to proposing such an amendment in any future legislative review of the governing access and privacy statutes to grant this important discretionary provision.