REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-09-04

Report Release Date: December 13, 2011

Public Body: Department of Labour and Advanced Education

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

1. Whether the Record was prepared in an appropriate manner including whether a complete search for responsive Records was conducted.
2. Whether Labour applied the exemptions in a blanket manner or whether severing could have been applied to the responsive Record in accordance with section 5(2) of the *Act.*
3. Whether the withheld information would reveal the substance of Executive Council deliberations [section 13(1)].
4. Whether the withheld information fits the definition of advice or recommendations [section 14(1)].
5. Whether the withheld information could reasonably be expected to harm law enforcement [section 15(1)(a)].
6. Whether the withheld information could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion [section 15(1)(f)].
7. Whether the withheld information could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication [section 15(1)(g)].
8. Whether the withheld information is in a law-enforcement record and whether the disclosure would be an offence [section 15(2)(a)].
9. Whether the withheld information is in a law-enforcement record and the disclosure could reasonably be expected to expose someone to civil liability [section 15(2)(b)].
10. Whether the withheld information fits the definition of solicitor-client privilege [section 16].

11. Whether "not applicable" can be used to sever information from a responsive record. If yes, whether the information is in fact not applicable.
12. Where it has been determined that a discretionary exemption applies, whether Labour has properly exercised its discretion to apply the discretionary exemptions.
13. Whether the withheld information fits the definition of personal information.
14. If yes to #13, whether the disclosure would be an unreasonable invasion of third party privacy [section 20].
15. Whether the withheld information meets the three-part test for business information [section 21].
16. Whether Labour has caused an inordinate delay in the processing of the Application for Access to a Record and during the Review process.
17. Whether Labour has met its duty to assist [section 7], including whether its disclosure decisions were open, accurate and complete.
18. Whether public interest is a factor that should be considered in this case [section 31].
19. Whether Labour has misunderstood how to make an in-camera Representation and who controls the Review process involving the exchange of Representations between parties.

Record at Issue

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

The Record in this Review is a very large Record [approximately 2059 pages] and consists of a variety of document types. The responsive Record relates to an Occupational Health and Safety investigation in which the Applicant was the complainant.

Findings:

The Review Officer made the following Findings:

1. I find that the Applicant has not received an "open, accurate and complete" decision, which may result partly from an incomplete search. The *Act* requires a public body to "make every reasonable effort to assist the applicant and to respond without delay, openly, accurately and completely."
2. Where exemptions are relied upon and portions of the Record severed, I find that Labour has not provided any explanation as to how it exercised its discretion.
3. I find in this Review Labour did put its mind to preparing an Index, was granted time extensions based on its representation

that it needed time to prepare the Index and finally reneged on its promise to provide an Index that would not only have been prudent but ***in this case absolutely necessary***.

4. I find that by not retaining a copy of the severed Record sent to the Applicant, Labour appears to be in violation of the *Government Records Act* and, thus, is not in compliance with the *Standards for Administrative Records* for administrative records belonging to a public body of the government of Nova Scotia.
5. On a review of the entire Record, I find that the Applicant has not received an "open, accurate and complete" decision as a result of the way in which the Record has been prepared or produced as it does not meet that test of accurate and complete.
6. I find that had Labour, three years ago, created and Index *as it promised to do repeatedly*, assigned particular exemptions to particular parts of pages in the Record, three things may have been accomplished: the Applicant would understand what and why portions of the Record had been withheld and thus Labour would have met its duty to assist; both the Applicant and the Review Office would have been able to understand why hundreds of pages appear to be missing; and the Review Office would have been better able to guide the Applicant and Labour to a narrowed Review scope and a possible informal resolution. Further, I find that the kind of blanket application of multiple exemptions is not the appropriate manner in which to redact a record.
7. Labour has not addressed any part of the test under s. 13(1) of the *Act*, and it is completely unclear to which part of the Record Labour is attempting to apply s. 13(1). I find Labour has failed to prove that the disclosure of information would reveal the substance of Executive Council deliberations.
8. I find Labour has failed to provide anything to show that the definition of advice has been met and has failed to file any evidence that advice was sought or anticipated or to name anyone who was given the advice who could take action with respect to that advice.
9. The onus is on Labour to show (1) what law enforcement matter is affected; (2) identify the harm; and (3) directly connect the disclosure with the contemplated harm. While there was an investigation and a proposed prosecution that did not proceed, both were concluded prior to Labour making Decision #1 and its first release of the severed Record. In any event, and this applies equally to the discussion below for Issues #7 and #8, I find that Labour has failed to provide any details to meet the "expectation of harm test", which is an essential element.
10. I find the onus is on Labour to show how the disclosure of information would reveal information about prosecutorial discretion [such as decisions that were made] and I find Labour has failed to meet this onus.

11. I find Labour appears to have misunderstood the *status quo* at the time of the original Application for Access to a Record in relation to the fact that the investigation was finished and the prosecution withdrawn. I find Labour has failed to demonstrate how the fair trial exemption applies to any part of the Record.
12. I find the onus is on Labour to provide (1) evidence that the Record is in a law enforcement record and (2) the name and section of the enactment that makes disclosure an offence and Labour has failed to meet this onus.
13. I find Labour has failed to show how the release of any part of the Record could reasonably be expected to expose anyone to civil liability.
14. Labour is relying on the litigation branch of solicitor-client privilege because it referred to advice with respect to a pending prosecution. I find that Labour has failed to provide any evidence to demonstrate any portion of the Record falls within the communication branch of solicitor-client privilege.
15. I find that when a decision was made not to proceed with prosecution and charges dropped, the solicitor-client privilege exemption was no longer available to Labour.
16. In cases where parts of the Record are personal information, I find Labour should have claimed s. 20, an exemption that allows for personal information to be severed, rather than using "not applicable" as if it were an exemption.
17. I find that records management starts with the creation of a record and those working for public bodies should be cognizant of what is documented in a record. When communicating by e-mail about core business, public servants need to be cautious to restrict e-mail to the business matter at hand or risk personal discussions being made public.
18. I find Labour has erred on the side of withholding information in exercising its discretion.
19. I find that Labour cannot apply any of the discretionary exemptions claimed to any part of the Record.
20. I find that Labour has failed to demonstrate how all three parts of the s. 21 exemption apply to the Record.
21. I find the delay of three years since Labour received this Application for Access to a Record from the Applicant was excessive and could have been significantly reduced by the preparation of an Index and attention to detail in preparing the Record [line-by-line review] and noting exemptions and parts thereof for the Applicant.
22. I find Labour continues to show a lack of respect for applicants' fundamental right of access to information guaranteed by the *Act* and as interpreted by the Courts. I also find Labour continues to show a blatant disregard for the Review process as an independent impartial oversight body that has the statutory authority to Review its decisions under the *Act.*

23. I find that Labour partially met its statutory duty to assist by waiving the application and processing fees for the Applicant. I also find that Labour assisted by provided information to the Applicant that s/he had provided to or received from Labour to avoid the absurd result consequence. However, I find Labour failed in its decision letters to give any comprehensive reasons or indication how it exercised its discretion as required by the *Act*. I also find that Labour's failure to provide an Index to be most importantly a breach of promise to do so which it made on at least ten separate occasions. Because of the Record's size and the disorganized manner in which it was produced and provided to the Review Office, this failure was unhelpful and completely inappropriate.
24. I find that when exercising its discretion under all discretionary exemptions, Labour failed to consider the public interest in the Applicant needing to know as much information as possible in such circumstances. Labour should be aware of this need to know particularly as Labour represented its mandate to be a responsibility for safety in the workplace. I find Labour should have considered factors such as compassion, necessity, fairness and clarity in exercising its discretion taking into account public interest.
25. I find Labour has not complied with requests to provide Representations to the Review Office in a timely manner and it has chosen to disregard the delegated authority given the Review Office team.
26. I find there to be considerable confusion about the Review process and in particular the burden on Labour throughout the process to meet the onuses set by the statute. It appears Labour has totally disregarded the Investigation Summary provided for the primary purpose of assisting parties in preparing final Representations. I find Labour incorrectly takes the position that it determines what is at issue and when and how to respond in a Review.

Recommendations: The Review Officer made the following Recommendations to Labour:

1. Release to the Applicant all information withheld under exemptions for which Labour did not meet the onus to withhold, which includes all instances of the following: s. 13(1) [cabinet deliberations], 14(1) [advice and recommendation], all of s. 15 including 15(1)(a) [law enforcement], (d) [confidential sources], (f) [prosecutorial discretion], (g) [fair trial] and 15(2)(a) [offence], (b) [civil liability], 16 [solicitor-client], 21 [trade secrets].

2. Provide the Applicant with copies of all the missing pages that were outlined in the Appendix provided to Labour by the Review Office Director on September 14, 2011.
3. Review all information marked as "not applicable" and release all responsive portions of that information to which no exemption applies. Where an exemption such as s. 20 applies, note that on the severed Record with an explanation.
4. Specifically release to the Applicant the complete unsevered expert's report [ensure all pages are included in the release as there were three pages missing even in the copy provided to the Review Office].
5. Make every effort to resource the FOIPOP office adequately and appropriately particularly when the FOIPOP Administrator is unavailable for a variety of reasons where those reasons do not relate to operational requirements.
6. For all future Applications for Access to a Record, Labour adhere to the record retention schedule set out by statute and in STAR [the Standard for Administrative Records - Information Management Group 5200 -30], Information Access and Privacy Management and retain a copy of all versions of a record provided to the applicant, third parties and the Review Officer.
7. Provide the Review Office with a complete copy of the Record provided to the Applicant in response to these Recommendations.

Key Words: advice, blanket, burden, complaint, delay, delegation, discretion, employment, Executive Council, exemption, extension request, fair trial, head of the public body, in-camera, index of records, investigation, law enforcement, line-by-line, litigation privilege, onus, openly accurately and completely, personal information, prosecutorial discretion, reasons, recommendation, records management, solicitor-client privilege, STAR, unreasonably interfere with the operation of the public body, witness statements, workplace.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2, 13(1); 14(1); 15(1)(a),(d),(f),(g) and 15(2)(a),(b); 16; 20(1); 20(3)(b),(g); 21(1)(a)(ii),(b),(c)(i)(ii) and (iii); Occupational Health and Safety Act; Government Records Act ss. 9, 12.*

Case Authorities Cited: *NS Review Reports FI-10-41/FI-10-85/FI-10-86/FI-10-87, FI-07-58, FI-07-60, FI-10-26, FI-07-14, FI-04-50, FI-07-32, FI-06-71(M), FI-08-39, FI-08-107, FI-08-104; O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat) 2001 NSCA 132; R. v. Fuller, 2003 NSSC 58; Canadian Broadcasting Corporation v. Canada (Information Commissioner), 2010 FC 954; AB Order 96-006, AB Order 2001-002; BC Order 02-38, BC Order F05-27, BC*

Order 04-22; ON Order MO-2183; ON Order PO-2789; ON Order M-14; BC Order F06-11.

Others Cited: *Alberta FOIP Guidelines and Practices (2009); Standard for Administrative Records - Information Management Group 5200 -30 [STAR].*

REVIEW REPORT FI-09-04

BACKGROUND

An individual suffered an injury/illness that s/he believed resulted from his/her working conditions. This individual complained to the Occupational Health and Safety ["OHS"] Division of the Department of Labour and Advanced Education ["Labour"], which launched an investigation. The investigation led to charges being laid against the Applicant's employer and then subsequently withdrawn. The Applicant sought access to the records related to the investigation in the custody or control of Labour.

On September 9, 2008, Labour received an Application for Access to a Record from the Applicant that read as follows:

> *. . . all information the department has gathered since September 2005 to September 2008 on my case against [named corporate employer]. That means I want everything!*

On November 6, 2008, (58 days after receiving the Application for Access to a Record), Labour made a decision ["Decision #1"], which read, in part, as follows:

> *You have also requested a fee waiver as you are 'the applicant". As discussed between us by phone,* ***your application under the FOIPOP Act has been processed as a personal information access request and as such there are no applicable fees or costs incurred on your behalf.***
>
> *The relevant records have been reviewed in keeping with the access provisions of the FOIPOP Act, and you have been granted partial access to the records. The text which has been severed from the documents contains information that would reveal the substance of deliberations of the Executive Council (S. 13); information that would reveal advice or recommendations developed by or for a public body or a minister (S. 14); information pertaining to law enforcement (s. 15); information that is subject to solicitor-client privilege (S. 16); personal identifiable information which, if released, would be considered an unreasonable invasion of privacy (S. 20); and confidential information (S. 21). Specifically, the provisions applied are as follows: [quotes referenced sections of the FOIPOP Act].*
> ***[Emphasis added]***

On December 22, 2008 (received January 8, 2009) the Applicant filed a Request for Review, which read as follows:

> *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;*
>
> *I would like to see all of the information in my file, most of it is blacked out and I would like to see it.*

On January 12, 2009, the Review Office advised Labour that a Request for Review had been received. The letter required Labour to send a complete copy of the Record sent to the Applicant and a complete copy of the responsive Record to the Review Office. The complete responsive Record was to have severances highlighted, the sections of the *Freedom of Information and Protection of Privacy Act* [“*Act*”] relied upon for the severances noted at each instance, and the pages numbered. A corresponding Index of Records [“Index”] was also requested.

On January 14, 2009, the Review Office confirmed with the Freedom of Information and Protection of Privacy [“FOIPOP”] Administrator that Labour had not kept a copy of the severed Record provided to the Applicant so an exact copy of the Applicant’s version of the Record could not be provided to the Review Office. Further, Labour indicated that a copy of the complete responsive Record would be provided to the Review Office accompanied by an Index. This was due on January 28, 2009. Because the Record was large in size [more than 2,000 pages], Labour advised the Review Office it was unable to meet the deadline and the Review Office granted an extension until February 3, 2009.

On February 4, 2009, Labour requested another extension. The Review Office granted another extension until February 23, 2009, recognizing what Labour had agreed to do was time consuming. The extension was on the understanding that Labour needed time to prepare an Index for the large Record, to note the subsections of all of the exemptions claimed [except s. 20], so it was clear which exemption applied to which parts of the Record and to provide an explanation regarding s. 20.

On February 23, 2009, Labour requested another extension. It advised there had been a mishap with the Record and it now needed additional time to restore some of the documents, put the Record back in order and review the Record for missing pages and replace anything it might have lost. The Review Office did not grant another extension but rather noted the delay on the Review file.

On March 17, 2009, the Review Office contacted Labour to inquire why the file had not been received on March 2, 2009, as expected. Labour was advised in that correspondence that “any late responses to the Review Office may be included in the content of Review Reports.” Labour responded on March 18, 2009, indicating that there had been operational changes that had caused additional delay, leaving the Record ready but not the Index. Labour indicated that it had been advised by Justice that the Review Office had no jurisdiction to ask for an Index. In any event, Labour advised the Review Office that the Record would be delivered the following day with a partial Index. The Review Office confirmed with Labour that the complete Index would be pending completion.

On March 19, 2009, Labour advised that it was awaiting delivery of the Record to an off-site location and would not be able to deliver it to the Review Office until the following day.

The Record was received by the Review Office on March 20, 2009 but unfortunately there was no Index, the pages were not numbered consecutively, there were blank pages, there were pages ostensibly missing and there were duplicate portions of the Record. Importantly Labour had put multiple exemptions on withheld pages and had not indicated which specific exemption applied to which parts of the information.

On October 7, 2009, Labour indicated that to complete the Index would be operationally intensive and proposed a face-to-face meeting to enable it to explain the Record in lieu of providing the Index.

On November 6, 2009, the Review Office outlined some of the issues for Labour to which it responded with a repeat request for a meeting. The Review Office agreed to meet on the understanding that if that meeting did resolve all issues, Labour would provide the outstanding Index. After much back and forth a meeting was held on December 8, 2009. Minutes were recorded to enable the Review Office to share the clarification with the Applicant. The in-person meeting did not resolve the issues caused by the absence of an Index and did not produce the desired outcome. The meeting and the attempt to settle on the contents of the Minutes served only to divert and delay the Review further.

Several attempts were made to informally resolve some of the issues and narrow the scope of the Applicant's Application for Access to a Record. Labour never provided an Index, partial or complete, as it had promised to do, so the file was moved from the Case Review to the Investigation stage.

In June 2010, Labour agreed in part with an analysis provided by the Portfolio Officer with a view to reaching an informal resolution. In Decision #2 Labour agreed to resolve matters by withdrawing some minor severances. On May 19, 2010, the Review Office had provided a detailed, nine-page analysis of a portion of the Record and the related exemptions for the FOIPOP Administrator that could have resulted in upwards of 200 pages released but resulted in only three pages being provided to the Applicant.

On July 16, 2010, the Review Office sought an explanation from Labour for the discrepancies and inconsistencies in the Record: how many pages in the Record; why the pages were not numbered; why the Applicant's copy of the Record did not match the Review Office's; why some information was severed that was disclosed in another section of the Record; and when the Index would be completed. Labour's response throughout to these concerns has been that the Record was completed in anticipation of a court proceeding and therefore it was accurate.

On June 6, 2011, Labour corresponded with the Applicant indicating that given the passage of time it was its intention to disclose more of the Record including partial disclosure of the witness statements [even though Labour had previously indicated that these had been disclosed at the time of Decision #1].

On June 10, 2011 (received same day by fax without a copy of the portion of the Record disclosed) Labour made the following decision [Decision #3]:

> *This letter is further to my letter of June 6, 2011 regarding the Nov. 6, 2008 disclosure in response to your FOIPOP application LWD-08-050. [Applicant's FOIPOP request reproduced].*
>
> *As the disclosure decision was made 2 1/2 years ago, the severances made at that time have been reviewed in light of the passage of time. Please find enclosed full and partial*

disclosure of some of the originally severed text from approximately fifty pages of records.

Also, enclosed is partial disclosure of witness statements (approximately 300 pages). Personal identifying information has been severed from the witness statements in keeping with the mandatory personal information exemption (S.20) of the NS Freedom of Information and Protection of Privacy Act.

For the purpose of this Review, this is Labour's Decision #3 in response to the original Application for Access to a Record. Labour planned to courier a copy of the decision and the newly released portion of the Record to the Applicant but the courier would not deliver to a post office box. Labour decided to mail the decision and Record to the Applicant. Unfortunately a mail strike intervened. The Review Office requested that Labour courier the Record to the Applicant by asking for his/her civic address, which it did. Both the mailed and couriered copies eventually reached the Applicant but the two copies of the newly released part of the Record were different.

On September 13, 2011, Labour confirmed with the Applicant that as s/he was no longer pursuing a Review of its reliance on the s. 20 personal information exemption, it was withdrawing its reliance on s. 15(1)(d).

MEDIATION

Mediation was not attempted as none of the pre-conditions for doing so were in place.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Labour has provided the FOIPOP Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

The Record in this Review is a very large Record [approximately 2059 pages] that consists of documents to be filed with the courts and other supporting documents surrounding the OHS investigation in which the Applicant was the complainant.

EXEMPTIONS CLAIMED

The exemptions claimed by Labour are extensive and were as follows: Sections 13(1); 14(1); 15(1)(a), (d), (f), (g) and 15(2)(a), (b); 16; 20(1) and 20(3)(b),(g); 21(1)(a)(ii), (b), (c)(i)(ii)and (iii) of the *Act* and "not applicable". Excluding the claim of "not applicable," which is not an exemption under the *Act*, these total 13 exemptions.

On September 9, 2011, Labour informed the Review Office that because the Applicant was no longer seeking a Review of the s. 20 exemption [personal information of witnesses], Labour's reliance on s.15(1)(d) was withdrawn bringing the total down to 12 exemptions. The Applicant had made it clear s/he was not interested in receiving other people's personal information. In its final Representations on September 26, 2011, Labour indicated it had

withdrawn its reliance on s. 15(1)(g) in addition to s. 15(1)(d) but that was not the case when it advised the Applicant on September 13, 2011 when only one exemption was withdrawn.

REPRESENTATIONS

After the Investigation was complete, both parties had an opportunity to provide additional Representations in anticipation of the formal Review. The Investigator completed work on the file and forwarded it to formal Review on October 11, 2011.

All of the Representations received from the Applicant and Labour have been reviewed in detail and given due consideration. The Applicant had no burden under any of the exemptions claimed. Had s/he pursued s. 20 of the *Act,* the Applicant would have had to demonstrate that the disclosure of personal information was not an unreasonable invasion of third party privacy. The Representations will be discussed throughout the remainder of this Report but will not be reproduced here.

ISSUES UNDER REVIEW

During the Review, the following issues were identified, including whether Labour appropriately applied the *Act,* and, in particular:

1. Whether the Record was prepared in an appropriate manner including whether a complete search for responsive Records was conducted.
2. Whether Labour applied the exemptions in a blanket manner or whether severing could have been applied to the responsive Record in accordance with section 5(2) of the *Act*.
3. Whether the withheld information would reveal the substance of Executive Council deliberations [section 13(1)].
4. Whether the withheld information fits the definition of advice or recommendations [section 14(1)].
5. Whether the withheld information could reasonably be expected to harm law enforcement [section 15(1)(a)].
6. Whether the withheld information could reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion [section 15(1)(f)].
7. Whether the withheld information could reasonably be expected to deprive a person of the right to a fair trial or impartial adjudication [section 15(1)(g)].
8. Whether the withheld information is in a law-enforcement record and whether the disclosure would be an offence [section 15(2)(a)].
9. Whether the withheld information is in a law-enforcement record and the disclosure could reasonably be expected to expose someone to civil liability [section 15(2)(b)].
10. Whether the withheld information fits the definition of solicitor-client privilege [section 16].
11. Whether "not applicable" can be used to sever information from a responsive record. If yes, whether the information is in fact not applicable.
12. Where it has been determined that a discretionary exemption applies, whether Labour has properly exercised its discretion to apply the discretionary exemptions.
13. Whether the withheld information fits the definition of personal information.

14. If yes to #13, whether the disclosure would be an unreasonable invasion of third party privacy [section 20].
15. Whether the withheld information meets the three-part test for business information [section 21].
16. Whether Labour has caused an inordinate delay in the processing of the Application for Access to a Record and during the Review process.
17. Whether Labour has met its duty to assist [section 7], including whether its disclosure decisions were open, accurate and complete.
18. Whether public interest is a factor that should be considered in this case [section 31].
19. Whether Labour has misunderstood how to make an in-camera Representation and who controls the Review process involving the exchange of Representations between parties.

Each of the issues will be reviewed in the Discussion section that follows.

DISCUSSION

At the outset, it is important to remember the purpose of the *Act* is clearly laid out in s. 2 and reads as follows:

> *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 right of access,***
>
> . . .
>
> *(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.***
>
> ***[Emphasis added]***

The Nova Scotia Courts have consistently judged the *Act* to be one of the clearest and most progressive in Canada particularly in relation to its requirement for public bodies to be ***fully accountable*** *[See O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat) 2001 NSCA 132; also R. v. Fuller, 2003 NSSC 58].* The fundamental right of a person to access information is considered a quasi-constitutional right *[See Canadian Broadcasting Corporation v. Canada (Information Commissioner), 2010 FC 954].*

The Applicant sought access to the Record that involved Labour's workplace investigation resulting from the Applicant's complaint against his/her employer. The Applicant made it clear that the purpose behind his/her access to information request was to clarify a

medical condition and to better understand why charges against the employer were suddenly dropped. The Applicant indicates that someone involved in the initial investigation against the employer advised him/her that when s/he received access to the file s/he would better understand what happened. In effect, the Applicant was in a situation wherein s/he believed that a government process was close to resolving his/her complaint. At the last minute the government body investigating *made a decision* to drop the charges. The Applicant felt that s/he did not fully understand the reasons behind that decision and took a *divergent view* of the decision and was told that s/he would be *better informed* of the process once s/he had an opportunity to access the records on the file. The Applicant was advised that if s/he wanted access to the information, s/he would have to make an access to information request under the *Act.* In these respects, the request made by the Applicant is wholly consistent his/her quasi-constitutional right to access information consistent with the purposes laid out in s. 2 of the *Act*.

ISSUE #1: Preparation of the Record

The Record Labour provided to the Review Office contained a myriad of problems. The confusion created by the preparation of the Record made it necessary for the Review Office to ask the Applicant for a copy of the Record s/he actually received. That request revealed even more issues. Those included:

- Missing partial or full pages in the Record given to the Applicant;
- Labour did not notice pages were missing even where a portion of the Record has pages which are numbered;
- There is an inaccurate page count for the Record. Labour does not appear to know the number of pages for the full Record and did not seem aware pages were missing. Evidence of this includes:
    - In its June 6, 2011 decision letter to the Applicant, Labour stated that the disclosure will be "approximately 300 pages". The Applicant actually received two different packages – one by courier and one by regular mail – one which was 309 pages, and another which was 378 pages. The package the Review Office received, intended to represent the complete copy of what was provided to the Applicant, was 447 pages, 68 pages of this were duplicates and therefore was 379 pages. This is close to what the Applicant received but in fact does not represent the true number of pages as there were missing pages and page numbering issues. Both the Applicant and the Review Office contacted Labour about missing pages/discrepancies and Labour responded that the number of pages actually released was 447.
    - On June 28, 2011 Labour quoted to the Applicant that the total number of responsive pages in the Record is 2059, which is solely based on the page numbering but the page numbers are inaccurate because there are missed page numbers, duplicate page numbers, missing pages and duplicate pages.

- The full Record was not numbered as a Record. In other words, when the full Record was compiled bringing together all documents and information that were responsive to the Application for Access to a Record, Labour did not begin numbering at page one and number the full Record consecutively;

- Many pages have all information severed from the entire page and more than one exemption has been claimed with no explanation for how each of the exemptions apply to particular information or parts of the Record;
- On pages where some information is released and other information withheld, Labour gave no indication as to which exemptions apply to which portion of the information;
- No explanation in the decision or as a sidebar/annotation on the Record itself explaining how Labour had exercised its discretion to sever;
- No Index of the Record was prepared or provided;
- Labour made a commitment to prepare an Index, subsequently confirmed that the Index was half complete and ultimately refused to provide an Index;
- Labour advised the Review Office that it could not provide the Review Office with a copy of the version of the Record it had given to the Applicant. Labour had not kept a copy of what was provided to the Applicant and had not prepared a copy of the severed Record for the Review Office; and
- Labour claimed that the Applicant had received copies of anonymized witness statements with personal information redacted in its original decision. In the copy the Applicant provided to the Review Office, there were no witness statements in any form included. Labour made a decision to disclose the severed versions of the witness statements on June 10, 2011, although it had previously claimed the witness statements were part of the original release to the Applicant on November 6, 2008.

As this Review progressed, the Review Office identified 'adequate search' as an issue because it became apparent that pages were missing from a number of the documents in the Record. This is no small matter. A record of this size needs to be properly prepared for the applicant seeking access to information. In this case, Labour indicated that some of the information contained in the Record had already been prepared or organized for Court. Labour stated:

> [addresses a specific portion of the Record only] - *it was being prepared for court, and therefore is required to be complete version of the notebook chronicling the investigation* . . . [December 8, 2009]

Adequacy of search is part of a public body's duty to assist. This is closely tied to another issue – open, accurate and complete decision letters – that will be discussed below. If s/he is not aware of what has been withheld and why, an applicant does not know what might be missing. This could lead to a Request for Review when one may not be necessary if the Record has been properly prepared. Where it was not clear what had been identified as responsive and what had not, I said recently in Review Report *FI-10-41/FI-10-85/FI-10-86/FI-10-87:*

> *The first factor is the adequacy of the search conducted by Transportation for the Records. The Review Office identified this issue during the course of the Review, as it appeared that not all attachments were included during the compiling of the Record. The Applicant would not have been in a position to identify this because in most cases, the pages were either severed in full or the reference to the attachment was severed . . . Where it was not clear what had been identified as responsive and what had not, the Review Officer has stated in a previous Review that:*

[A]n Index of Records . . . given at the time of the first decision would have resolved this confusion for the Applicant as the existence of those documents as part of the Record would have become known. . .
To summarize, ways to ensure an applicant is aware that the responsive record is complete, can be achieved in a number of ways including:
1. Provide an Index of Records at the outset;
2. Make reference to the portion of the record that was received from the Applicant in the decision letter;
3. Provide a Summary confirming what is in the record that is not being provided because it was received from the Applicant;
4. Offer to the Applicant to come and view this portion of the record on site;
5. Provide copies of the documents at the expense of the Applicant.
[FI-07-58]

Even where it is only specific pages that are able to be identified as missing, in *FI-07-60* I stated:

I am left with doubts as to the adequacy of the search even at the conclusion of this Review process. The discrepancies are so many and so complex it is difficult to understand if the problem is adequate search, poor records management or poor handling of the access to information process.

Prior to the completion of the investigation in order for the Review Office to determine whether or not an adequate search had been conducted, Labour was asked to answer specific questions, which were as follows:

- Were records in any form or format considered (i.e. electronic, paper, other)?
- Is the original access request very broad and could include information developed over a wide open time period? If so, how did you define the search?
- How did you search for the records in the public body's possession?
  - Did you search yourself?
  - Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?
  - Did you send out an email to other units, etc?
- Could records also exist that are responsive to this access request that are not in your possession, but in your control?
  - Did agents, consultants or other contracted services have any role in the project the access request is referencing?
  - If yes, are these records included in the package provided to the Review Office?

In response, Labour provided the following Representation on September 9, 2011:

It may be that in the photocopying of over 2,000 pages a few may have not copied . . . it was neither intentional nor malicious and certainly not a search issue . . . all modes of records were searched. May I point out that the records were all collected for a court prosecution. This adds to the credibility of the search done.

I find that the Applicant has not received an "open, accurate and complete" decision, which may be, at least in part, as a result of an incomplete search. The *Act* requires a public body to "make every reasonable effort to assist an applicant and to respond without delay openly, accurately and completely" *[Refer to s. 7 of the Act]*.

The search issues, and most, if not all other issues associated with the preparation of the Record could have been clarified through the production of an Index. Labour had been granted at least five time extensions for the sole purpose to allow it to prepare and provide an Index as it had promised. There has been some resistance by FOIPOP Administrators about the necessity of an Index for any record, including resistance to Review Office requests to prepare one, not just in the course of a Review but at the outset at the time of making a decision in response to an Application for Access to a Record, particularly for a complex Record. Some public bodies provide exemplary Indexes that make a significant difference both for the Applicant and the Review Office.

In addition to clarifying that all the responsive records have been included in the search, an Index also helps to identify how the use of exemptions has been 'limited and specific' by highlighting the particular pages or types of information being withheld. Without that level of detail, this Review is left with broad exemptions being claimed over significant portions of the Record. In cases where an exemption is applied to an entire portion of the Record with no apparent attention to detail it is referred to as the public body applying a blanket exemption. In this case with the potpourri of exemptions claimed [numbering 13 throughout the Review and 12 at the end] and many thrown over at least half of the Record, this can be referred to as Labour applying blanket exemptions. These problems will also be discussed below for issue # 17 as it relates to Labour's duty to assist the Applicant. Where exemptions are relied upon and portions of the Record severed, I find that Labour has not provided any explanation as to how it exercised its discretion.

I find in this Review Labour did put its mind to preparing an Index, was granted time extensions based on its representation it needed time to prepare the Index, and finally reneged on its promise to provide an Index that would not only have been prudent but ***in this case absolutely necessary***.

With respect to Labour's failure to retain a copy of the Record provided to the Applicant, the Nova Scotia *Government Records Act* provides as follows:

> *Records schedules*
> *9 (1) Every head of a public body having custody or control over records shall prepare one or more records schedules that*
>
> > *(a) describe, classify and index all the records in the custody or under the control of the public body;*
> > *(b) govern the life cycle of the records, including*
> >
> > > *(i) the creation, receipt, handling, control, organization, retention, maintenance, security, preservation, conservation, destruction or alienation of the records,*

(ii) the period prescribed for retention of records in the custody or under the control of the public body, and
(iii) the disposition of the records, whether by transfer to the Public Archives, destruction or alienation; and

(c) provide for retention periods and establish whether each class of record is to be permanently preserved, destroyed or otherwise alienated from the custody or control of the public body.

(2) The head of a public body shall forward each records schedule to the Minister for review and recommendation by the Committee and, upon doing so, so advise the Provincial Archivist.

That statute imposes a duty on a public body in relation to maintaining the records in its custody and control as follows:

Duties of public body
12 The head of a public body shall

(a) apply each records schedule for which the head is responsible and that has been approved in accordance with this Act; and
(b) protect and maintain records in the custody or under the control of the public body so that records are

(i) usable and accessible,
(ii) transferable,
(iii) legible and understandable, and
(iv) maintained in formats, media and conditions that ensure retention and preservation in accord with the records schedules. 1995-96, c. 7, s. 12.

The Standard for Administrative Records ["STAR"] is the records classification system and retention schedule for administrative records belonging to public bodies of the government of Nova Scotia. *[Refer to http://www.gov.ns.ca/nsarm/star/]*

STAR provides the retention and destruction schedule for information management and FOIPOP request case files must be kept for nine years after an application is processed and the appeal period has been completed or has expired [See 5200-30].

According to Labour's website:

Labour and Advanced Education administers and maintains effective controls over the receipt, creation, use, storage, and final disposition of all departmental records, regardless of format, through its records management program. The program ensures that the management of the Department's records is consistent with the Nova Scotia Government Records Act, the Public Archives Act, and the Freedom of Information and Protection of Privacy Act.

The records management program also ensures the implementation and further development of the Government of Nova Scotia's standardized approach to records

management. The Department's records are considered a valuable corporate resource, and therefore, they are appropriately scheduled and managed throughout their life cycle. The records management program contributes to effective departmental decision-making by providing timely access to records, by ensuring accountability to the public by protecting and preserving records of departmental decisions and activities, and by supporting the delivery of departmental programs and services. The Department maintains and provides access to its records through a centralized records office.
[Emphasis Added]
[http://www.gov.ns.ca/lae/divisions/recordsmanagement.asp]

I find that by not retaining a copy of the severed Record sent to the Applicant, Labour appears to be in violation of the *Government Records Act* and, thus, is not in compliance with the STAR for administrative records belonging to a public body of the government of Nova Scotia.

On a review of the entire Record, I find that the Applicant has not received an "open, accurate and complete" decision as a result of the way in which the Record has been produced or prepared as it does not meet the test of accurate and complete.

ISSUE #2: Severing in Accordance with Section 5(2) of the *Act*

The *Act* requires that during the course of processing an Application for Access to a Record, the public body will conduct a line-by-line review of each document and apply exemptions in a manner that is consistent with the purpose of the *Act*: specific and limited *[See FI-10-26]*. Section 5(2) of the *Act* requires a public body to provide an applicant with any part of the Record to which no exemption applies. That is, it must sever the Record, line-by-line, and provide access to the remainder of the information.

On September 26, 2011, in response to specific questions it was asked to address in its final Representations, Labour made the following Representation:

It must be considered that the disclosure decision was made upon the content of the records, not on the type of record that it is. A line-by-line review of the responsive records was done when making the initial disclosure decision.

While Labour has severed portions of many pages of the Record, there were problems with how the Record was presented. Labour failed to be specific in its examination of the Record: there are pages missing, the Record is not numbered consecutively, the exemptions claimed are not applied to specific parts of the Record and there are at least 220 pages where the entire page has been withheld. Labour originally claimed 13 exemptions to support Decision #1 to withhold a large portion of the Record. At the time of making its initial decision with respect to release of the Record, Labour applied an excessive number of exemptions, some of which were unclear and indiscriminately applied.

Sections of the *Act* have been claimed but without specifying which subsections are being relied upon. For example, the s. 15 exemption has fourteen subsections, a possible 5 of which have been applied. Labour has marked certain pages with simply "s. 15." This provides virtually no information from which the Applicant can gain insight into the refusal to provide access to information. It makes it impossible for me as the Review Officer to make a finding

that the specified and limited exemption applies. This is what blanket application of exemptions means; where the shadow of as many as 13 exemptions are cast over a large volume of pages. There are multiple exemptions applied to each page in full – exemptions are not applied to specific pieces of information in the Record. From my reading of the Record, it is not possible that multiple exemptions apply to the same portion of information on each page. This leads me to conclude a line-by-line review has not been done on a substantial number of pages.

I find that if, at the outset three years ago, Labour had created an Index, *as it promised to do repeatedly,* assigning particular exemptions to particular parts of a page, three things may have been accomplished. The Applicant would understand what and why portions of the Record had been withheld and thus Labour would have met its duty to assist. Both the Applicant and the Review Office would have been able to understand why hundreds of pages of the Record appear to be missing. The Review Office would have been in a better position to guide the Applicant and Labour to narrow the scope of the Review and thus make informal resolution possible. Further, I find that the kind of blanket application of multiple exemptions is not the appropriate manner in which to redact a record.

ISSUE #3: Section 13 – Executive Council Deliberations

In *FI-07-14*, I stated:

> *The key to evaluating whether or not the cabinet confidentiality exemption has been properly applied to a particular document is to rely on the test of* ***whether the disclosure would reveal the substance of deliberations of an Executive Council.***
>
> . . .
>
> *Considerations a head of a public body may want to bear in mind in determining whether the exemption of cabinet confidentiality applies include, but are not limited to:*
>
> > *1. Has the policy that is the subject of the Executive Council deliberations been announced or implemented?*
> > *2. What is the subject matter of the information contained in the record?*
> > *3. Does the record contained draft legislation or regulations?*
> > *4. Has the record actually been considered by the Executive Council?*
> > *5. Would release of the information disclose the deliberations of Executive Council, policy discussions between Ministers or the particular position taken by a Minister?*
>
> ***[Emphasis in original]***

Labour has not addressed any part of the test under s. 13(1) of the *Act*, and it is completely unclear to which part of the Record Labour is attempting to apply s. 13(1). I find Labour has failed to prove that the disclosure of information would reveal the substance of Executive Council deliberations; therefore, I find the exemption cannot be applied to any part of the Record.

ISSUE #4: Section 14 – Advice or Recommendation

Both the Executive Council deliberations and this advice exemption are foundational to the effective functioning of government and the balance that the *Act* attempts to find. The purpose of this exemption is to protect the open and frank discussion of policy issues and the internal decision-making in public bodies. It recognizes that government must be able to engage in candid internal discussions, so as not to impair or interfere with the workings of public bodies.

In order for the exemption to apply, the information must fit the definition - the information must lead to a course of action. Once that is established, a number of questions must be explored to see if the exemption is applicable. These questions include:

- Was advice sought or expected?
- What type of "advice" was sought?
- Was the "advice" intended to be confidential?
- At what action or decision was the "advice" directed?
- Was the "advice" directed at someone who could take or implement the action or decision? If yes, to whom was the "advice" directed? and
- Were there candid discussions, deliberations or the like over the "advice" [i.e. a deliberative process]?

The exemption cannot be applied to any of the information/document types listed in s. 3(1)(a) of the *Act*, which fall within the statutory definition of background information.

This exemption is the subject of a large number of Reports, Orders and advisory materials both in Nova Scotia and other Canadian jurisdictions, which discuss other factors to consider and types of information that have been found to not fit the definition of advice or the exemption, for example:

- Inaccurate information will not impact on the decision to release or not *[FI-04-50].*
- Access cannot be denied because the Applicant might improperly interpret the information *[FI-07-32].*
- The exemption would not normally apply to factual information which is presented to describe certain issues, problems or events *[Refer to Alberta's FOIP Guidelines and Practices (2009), page 179].*
- The narrative of events, unless advising on what should be done to prevent such occurrences or to advise on what went wrong, is not advice, nor is the bare recitation of facts without anything further *[AB Order 96-006].*
- Unsolicited advice, as it is not sought nor expected, does not engage the exemption *[AB Order 2001-002].*
- Views or beliefs of the author, unless they set out or imply options or recommended courses of action *[BC Order 02-38]*, are not advice.
- The amount of information already disclosed is irrelevant *[BC Orders F05-27 and 04-22].*
- Analytical information, evaluative information, notifications or cautions, views, draft documents, a supervisor's direction to staff on how to conduct an investigation and background information have been found not to qualify as advice. In addition, it is

absurd to withhold information that that was disclosed to the Applicant in another part of the Record *[ON Order MO-2183]*.

If the information does not fit the definition of advice or recommendation, the exemption cannot be applied.

The burden of proof is with Labour to establish all three of the following:

1. How each piece of information withheld fits the definition of advice or recommendations;
2. If the definition of advice is met, Labour must demonstrate that the advice was sought or expected; and
3. That the advice was directed at someone who could take or implement the action or decision.

Again, it is not clear from the information Labour provided throughout the course of this Review, to which part of the Record the exemption is being applied, nor is it clear how any of the severed information meets the definition of advice. I find that Labour has failed to provide anything to show that the definition has been met, has failed to file any evidence that advice was sought or anticipated or to name anyone who was given the advice who could take action with respect to that advice. I find that Labour has failed to address any part of the test in s. 14 of the *Act*; therefore, the s. 14 exemption cannot be applied to any part of the Record.

ISSUE #5: Section 15(1)(a) –Harm to Law Enforcement

Prior to the Applicant's Application for Access to a Record there was an investigation leading to a possible prosecution. By the time Labour made Decision #1 on November 6, 2008, there was no ongoing investigation and a decision had been made not to prosecute. Though charges had been laid, they were dropped on September 6, 2008; in fact, the decision to drop the charges after the conclusion of the investigation is what prompted the Applicant to apply for access to the Record in the first place.

From the information provided by Labour, it is not clear what aspect(s) of law enforcement is expected to be harmed by disclosure of those portions of the Record.

In order for information to qualify for exemption under s. 15(1)(a), the matter to which the records relate must first satisfy the definition of the term "law enforcement", found in s. 3(1) of the *Act*, which states:

(e) "law enforcement" means

(i) policing, including criminal-intelligence operations,
(ii) investigations that lead or could lead to a penalty or sanction being imposed, and
(iii) proceedings that lead or could lead to a penalty or sanction being imposed;

This section carries the reasonable expectation of harm test in order for it to apply; speculative harm will not suffice. The onus is on Labour to show (1) what law enforcement

matter is affected; (2) identify the harm; and (3) directly connect the disclosure with the contemplated harm. While there was an investigation and a proposed prosecution that did not proceed, both were concluded prior to Labour making Decision #1 and its first release of the severed Record. In any event, and this applies equally to the discussion below for Issues #7 and #8, I find that Labour has failed to provide any details to meet the "expectation of harm test", which is an essential element. I find, therefore, that the exemption cannot be applied to any part of the Record.

ISSUE #6: Section 15(1)(f) –Prosecutorial Discretion

This exemption is intended to protect against revealing information that has been provided to and used by prosecutors. That is to say that disclosure of that part of the Record would reveal how the prosecutor exercised his/her discretion.

In *FI-06-71(M)*, as the *Act* in Nova Scotia does not define the phrase 'prosecutorial discretion', I relied on a definition from British Columbia's legislation, which reads as follows:

> *"exercise of prosecutorial discretion" means the exercise by Crown Counsel, or by a special prosecutor, of a duty or power under the Crown Counsel Act, including the duty or power*
>
> *(a) to approve or not to approve a prosecution,*
> *(b) to stay a proceeding,*
> *(c) to prepare for a hearing or trial,*
> *(d) to conduct a hearing or trial,*
> *(e) to take a position on sentence, and*
> *(f) to initiate an appeal.*
>
> *[RSBC 1996] c. 165, Schedule 1.*

I find that the onus is on Labour to show how the disclosure of the information would reveal information about prosecutorial discretion [such as the decisions that were made] and I find that Labour has failed to meet this onus. I find, therefore, the exemption cannot be applied to any part of the Record.

ISSUE #7: Section 15(1)(g) –Right to a Fair Trial or Impartial Adjudication

This exemption has not been discussed in any detail by the Nova Scotia Review Officer or the Courts. In Ontario, the Commissioner said the following in *PO-2789*:

> *In order for these same records to qualify for exemption under section 14(1)(f), I must be satisfied that there is a "real and substantial risk" of interference with the right to a fair trial or impartial adjudication with its disclosure. The exemption is not available as a protection against remote and speculative dangers [Order P-948; Dagenais v. Canadian Broadcasting Corp. (1994), 120 D.L.R. (4th) (S.C.C.); Order PO-2037, upheld on judicial review in Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner)].*

The Commissioner in Newfoundland & Labrador, discussed this exemption in *Report 2006-014* and determined that the public body involved was not a "person" within the meaning of its statute and, therefore, the public body could not rely on that exemption to deny access to the information in question.

On December 8, 2009, Labour made the following Representation with respect to this exemption:

> *Third party rights (including witnesses) to a fair trial or adjudication may be impacted by the disclosure of some of the information if disclosed. When the Applicant's Form 1 was first being processed, the matter was going through adjudication. The Applicant also had a right to appeal through the OHS Appeal Panel and the matter was being considered for charges to be laid. The Applicant also may have lodged a complaint to the Ombudsman. Due to all of these ongoing and possible different appeal processes [both internal to government and in civil court] at the time of processing the Applicant's Form 1, the 15(1)(g) exemption was applied to ensure those processes weren't compromised by something done in processing the Applicant's Application for Access to a Record.*

On September 26, 2011, Labour made an additional Representation that read as follows:

> *This . . . exemption was applied to the records in keeping with the mandate of the Occupational Health and Safety Division whose mandate was to investigate the workplace complaint of the applicant to affect a solution. The OHS division took this investigation to the judicial stage with recommended charges laid against the company. As much information and documentation which could be supplied to the applicant through the OHS investigation process, the judicial process, and the FOIPOP process has been supplied to [Applicant].*

Where no possibility of a trial or adjudication exists, the exemption for right to a fair trial does not apply *[See Ontario Order M-14]*. As stated, Labour needed to present specific arguments about how or why the disclosure of information could deprive a person of the right to a fair trial. Labour's reliance on this exemption remains unclear. If it was concerned about itself facing hypothetical proceedings, this exemption is inappropriate as it only applies to a person. If it was concerned about the Applicant or his/her employer having a fair trial, by the time Decision #1 was made the charges had been dropped and the Crown had made it clear the prosecution would not be proceeding. For the purpose of this exemption, any complaint to the Ombudsman does not fit within the definition of "proceeding."

I find Labour appears to have misunderstood the *status quo* at the time of the original Application for Access to a Record in relation to the fact that the investigation was finished and the prosecution withdrawn. I find Labour has failed to demonstrate how the fair trial exemption applies to any part of this Record; therefore, I find the exemption cannot be applied to any part of the Record.

ISSUE #8: Section 15(2)(a) – Disclosure of a Law-enforcement Record an Offence

On June 25, 2010, Labour made reference to this exemption in what it referred to as a confidential Representation. Labour had not made a request to the Review Officer to provide its Representations in-camera. In any event, what it stated regarding the investigation is well known to the Applicant and is made public elsewhere in the released Record. The issue of in-camera Representations will be addressed at Issue # 19.

On September 26, 2011, Labour made the Representation referenced above *[See Issue # 7]* with respect to the law-enforcement exemption.

I find that the onus is on Labour to provide (1) evidence that the Record is in a law-enforcement record and (2) the name and section of the enactment that makes the disclosure an offence and I find that Labour has failed to meet this onus. I find, therefore, the exemption cannot be applied to any part of the Record.

ISSUE #9: Section 15(2)(b) –Exposure to Civil Liability

Sections 78 and 79 of the *Occupational Health and Safety Act* respectively address civil liability and time limits for prosecution:

> ***Immunity from civil action***
> *78 No action lies or shall be instituted against an officer, a committee, a member of a committee, a representative, the Director, an appeal panel, a member of an appeal panel or the Director of Labour Standards where that person or body is acting pursuant to the authority of this Act or the regulations for any loss or damage suffered by a person because of an act or omission done in good faith by the person or body*
>
> > *(a) pursuant to, or in the exercise or supposed exercise of, a power conferred by this Act or the regulations; or*
> > *(b) in the carrying out, or supposed carrying out, of a function or duty imposed by this Act or the regulations.*
>
> ***Limitation period for prosecution***
> *79 A prosecution for an offence pursuant to this Act shall not be commenced more than two years after the later of*
>
> > *(a) the date on which the offence was committed; or*
> > *(b) the date on which evidence of the offence first came to the attention of an officer.*

The entire Record would seem to fall under the Immunity from Civil Action clause of the *Occupation Health and Safety Act*, and the limitation period for prosecution has clearly lapsed. Access to information case law is clear that, where no possibility of civil liability exists, the *FOIPOP* exemption protecting against civil liability is not operative *[Refer to BC order F06-11]*.

Labour has the burden to identify which person could reasonably be exposed to civil liability and how.

On December 8, 2009, Labour provided the following Representation:

> *This exemption was claimed pertaining to Third Parties who are witnesses who gave statements. These witnesses gave statements for the purpose of the investigation with the knowledge that they may have had to appear in court; however, as the charges were withdrawn by the Crown, the witness statements were not entered into the court record.*

I find Labour has failed to show how the release of any of the Record could reasonably be expected to expose any 'person' to civil liability. I find, therefore, the exemption cannot be applied to any part of the Record.

ISSUE #10: Solicitor-client Privilege

There are two recognized 'branches' of the solicitor-client exemption – communication privilege and litigation privilege. Communication privilege exists to enable clients to feel free and protected to be candid with their lawyers with respect to their affairs so the legal process can function – basically to protect the lawyer/client relationship. Litigation privilege exists to protect the adversary system of justice by ensuring a zone of privacy for counsel preparing a case for litigation – basically to protect the litigation process.

To date it is not clear from the Representations that Labour has provided which 'branch' of the solicitor-client privilege exemption is being applied on a document by document basis. It is important to establish which branch is being applied to each document, as the tests for each are distinct.

On September 24, 2010, Labour made the following Representations with respect to this exemption:

> *As regards records of, and correspondence with, the Crown Prosecutor, in all matters of the prosecution, that office was advising the Department on legal matters. Therefore it is held that there is a solicitor-client relationship.*

Labour bears the onus to identify which branch of exemption is applicable and provide Representations on how it applies to the severed information. I find based on that Representation, Labour is relying on the second branch of the privilege because it related to advice with respect to a pending prosecution: litigation privilege. I find Labour has failed to provide any evidence to demonstrate any portion of the Record falls within the first branch of the privilege: communication privilege.

As stated above, the purpose of litigation privilege is to protect a process. It is intended to protect information created to prepare for or conduct litigation that is underway or that is likely to happen at the time the records were created and which are, therefore, protected so the legal strategy is not prematurely revealed. Basically, it must be clear that the dominant purpose for which the record was created was in anticipation of litigation, which is defined as either an actual lawsuit or the process of carrying out a lawsuit, but is not restricted to communications between a lawyer and his/her client. Unlike the communications branch which endures until the

client waives the privilege, litigation privilege ceases when the litigation no longer exists, because it is either concluded or discontinued.

I find that when a decision was made in September 2008 for the prosecution not to proceed and the charges were dropped, this exemption was no longer available to Labour. I also find that again Labour has failed to make it clear to either the Applicant or the Review Office to which portion of the Record the exemption was being applied. I find, therefore, the solicitor-client exemption cannot be applied to any part of the Record.

ISSUE #11: "Not applicable" used to Sever Information from the Responsive Record

Portions of the Record have been withheld with a 'N/A' (not applicable) reference, claiming that the portion of the Record is not applicable or not responsive to the scope of the Application for Access to a Record. The Applicant's Application for Access to a Record was for "all information the department has gathered since September 2005 to September 2008 on my case. That means I want everything!" This means that any Record that has to do in any way to the 'case' would be responsive.

The provision of the *Act* which permits severing a record *[See (s. 5(2))]* allows a public body to deny access to "information exempted from disclosure pursuant to this Act." The exemptions are clearly expressed in their own sections of the *Act*, specifically at ss. 12 through 21 inclusive.

In a recent Review Report *[FI-10-41/FI-10-85/FI-10-86/FI-10-87],* I found that:

> *"not responsive" cannot be used as if it were an exemption to try and withhold information that does not fit within any of the exemptions simply because the public body does not want to release it, and that Transportation's use of "not responsive" is wholly inappropriate and not permitted under the Nova Scotia legislation.*

Once a page is deemed to be responsive to an applicant's Application for Access to a Record, the entire page is responsive, unless certain "limited and specific" exemptions apply.

In cases where there are parts of the Record that are personal information, I find Labour should have claimed s. 20, an exemption that may allow for personal information such as personal pleasantries to be severed, rather than trying to use 'N/A' as if it were an exemption. I find that records management starts with the creation of a Record and those working for public bodies should be cognizant of what is documented in a record. When communicating by e-mail about core business, public servants need to be cautious to restrict e-mail to the business matter at hand or risk personal discussions being made public.

ISSUE #12: Discretionary Exemptions

It is important to note that ss. 13, 14, 15, and 16 of the *Act* are discretionary, not mandatory. This means that even if the exemptions apply, Labour can choose not to apply them and release the requested information.

Labour has continually asserted that the Record was not 'the Applicant's' file, but rather a departmental investigation. This is despite the fact that when the Application for Access to a

Record was made in September 2008, Labour did not charge any fees and treated the application as one for the Applicant's personal information.

Given that Labour had treated the Application for Access to a Record as an access for personal information [no fees charged] one would have surmised that it would err on the side of disclosing as much information as possible.

In principle, it appears Labour agrees with that sentiment. On December 8, 2009, Labour provided the following Representation:

> *[T]ried to give as much information to the Applicant as possible without exposing third parties to a privacy violation.*

On September 26, 2010, Labour provided a similar Representation:

> *In the administration of this disclosure decision the department disclosed as much of the record as possible under the provisions of the Act.*

However, I find Labour has erred on the side of withholding information in exercising its discretion.

It is unnecessary to go further. Labour was given ample opportunity to provide Representations as to how the exemptions applied including substantial prompts in the Investigation Summary and in correspondence leading up to the formal Review. As I have found none of the exemptions apply, there is no need to further assess how Labour exercised its discretion.

In summary, I find that Labour cannot apply any of the discretionary exemptions claimed to any part of the Record.

ISSUE #13: Personal Information

This issue was resolved prior to the formal Review.

ISSUE #14: Unreasonable Invasion of Third Party Privacy

This issue was resolved prior to the formal Review.

ISSUE #15: Three-part Business Information Exemption

In *FI-08-39*, I stated:

> *Section 21 is designed to protect the "informational assets" of businesses or other organizations that provide information to the public body.*

Section 21 is a three-part test that relates to business information. If Labour believes that the exemption must be applied (as it is a mandatory exemption) the following questions need to be answered:

1. Which subsection of “part a” is applicable?
2. How does the information fit the definition?

   If (i):

   a. How is it used by the business?
   b. What is the commercial advantage?
   c. What efforts has the business made to protect this information historically?
   d. How could someone else improperly benefit or harm with the information?

   If (ii):

   a. How does the information “belong” to the business?

3. What evidence is there that shows that the business supplied the information to Labour?
4. What evidence is there to show that the information would be kept confidential?
5. Has this information been released/disclosed elsewhere (for example – on the company’s website, on the government’s website, in annual reports, news releases, speeches etc)?
6. What harm would result?
7. What evidence is there to show the linkage of the harm to the disclosure of the information?
8. What is the size of the marketplace and its competitive nature?
9. What other information is relevant to the applicability of the exemption?

If all three parts of subsection (1) cannot be met, then the exemption does not apply. Alternately, subsection (4) allows for a business to consent to the disclosure. Section 22 outlines the process for seeking consent.

The burden of proof is with Labour to prove the exemption fits by addressing the questions above. On September 26, 2011, after Labour was asked to address specific questions in its final Representations, it provided the following Representation:

> *It is clearly financial information of the company.*

I find that Labour has failed to demonstrate how all three parts of s. 21 of the *Act* apply to the Record and therefore it should not have been applied to this Record.

ISSUE #16: Inordinate Delays

During the course of the Application for Access to a Record and the Request for Review, there has been considerable delay on the Labour’s part.

I have discussed the issue of delays in a recent Review Report *FI-10-41/FI-10-85/FI-10-86/FI-10-87*:

> *Public bodies must be sensitive to the need to respond in a manner that is, from the time of receiving the Application for Access to a Record and throughout the process until the conclusion of a Request for Review, consistently open, accurate and complete.*

The total delay calculations are 28 days during the Application for Access to a Record process and 339 days during the Review process. Details of these delays were provided to Labour during the investigation stage of the Review process. When the Review Office requested Labour to provide its final Representations, it was specifically asked to address the issue of delay, as follows:

> *Given this information* [delay details], *is there any information that Labour would like to provide at this time regarding the delays identified above?*

Labour provided no Representation on the issue of delay. The only information I have to go on is the various reasons given during the Review. Labour was forthcoming for the various reasons for delay including:

- size of responsive record [on January 14, 2009; January 27, 2009; February 4, 2009; February 23, 2009]
- equipment malfunction [on February 23, 2009; January 12, 2010]
- office relocation and associated problems with the Record [on March 18, 2009]
- absences from the office [on November 9, 2009; January 29, 2010; June 22, 2010; September 1, 2010]
- under resourced [on November 9, 2009; May 30, 2011]

I recognize that in any public body there are going to be competing interests and there may inevitably be some delay. I believe it is incumbent on the public body to ensure the FOIPOP Administrator's office is sufficiently resourced to meet the demands of its office but in this case, the length of delay was inordinate.

This considerable delay can be attributed to Labour, at the outset not completing a line-by-line review of the Record and not providing an Index to the Review Office. Evidence to me that a line-by-line review was not done at the outset is the fact that in June of this year, nearly three years since its initial decision [Decision #1], Labour made another decision [Decision #3] to release a portion of the Record. Labour tried to downplay the significance of this late hour release of part of the Record by stating "it will not be a 'new' decision, but rather a full review by me of the decision I made in 2008 to determine if anything else can now be disclosed given the passage of time." As part of that final decision making process Labour agreed to do a line-by-line review of the withheld Record resulting in a substantial release of information. I find that the delay of three years since Labour received this Application for Access to a Record was excessive and could have been significantly reduced by the preparation of an Index and an attention to detail in preparing the Record [line-by-line review] and noting exemptions for the Applicant.

Having made that finding with respect to the issue of delay, I have one further observation to make. During this Review, there were times when Labour simply ignored a deadline, failed to request an extension of time, provided reasons that were more personal and did not demonstrate appropriate reasons for the delays. Labour appeared to operate as if its representative was in control of the process. I find that Labour continues to show a lack of respect for the Applicant's fundamental right to access information guaranteed by the *Act* and as interpreted by the Courts and shows a blatant disregard for the Review process as an independent impartial oversight body that has the statutory authority to Review its decisions under the *Act.*

ISSUE #17: Decision Letters and Duty to Assist

As part of a public body's duty to assist, s. 7 of the *Act* requires that all decision letters be open, accurate and complete including the reasons for any refusal to disclose information. This means that simply quoting the exemption number is not enough. In *FI-06-71(M)*, I addressed this relying on our Supreme Court, by stating:

> *It is important at the outset to emphasize the importance of the completeness of the initial correspondence between a public body and an Applicant. In this case, where a substantial portion of the record was denied to the Applicant, it was incumbent for the Police to provide full and adequate reasons for the refusal. I rely on McCormack v. Nova Scotia (Attorney General) (1993), Can Lll 3401 (NSSC), at para. 3 where Justice Edwards stated:*
>
> > *"Upon receiving a request the Minister should be mindful that the purpose of the Act is to provide for the disclosure of all Government information with necessary exemptions that are limited and specific (s. 2). The Act creates a right of access to information (s. 4(1)). The Minister ought to keep in mind that disclosure can only be refused if the requested information fits squarely within one of the exemptions in the Act.*
> >
> > *Secondly, 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."***
> >
> > *In the case at hand, the Police failed to provide any reasons and simply listed sections of the statute to justify the severed parts of the record. The Applicant's request was very specific in seeking access to his personal information, specifically naming the individuals he did not want information about. The onus rests with the public body in such cases to justify reliance on one of the statutory exemptions. Giving details to the Applicant is particularly important in such cases so as to enable him to understand how the circumstances of his case fall within the parameters of one of the exemptions.*
> > ***[Emphasis added]***

On September 26, 2011, Labour made the following Representations:

> *It is noted that the applicant was advised that [his/her] application would be dealt with as a personal information request, although there may be records which would not be considered [his/her] personal information. The applicant was advised that there would be no costs incurred by [him/her] (neither application fee nor processing fees) in the administration of [his/her] application.*
>
> *When the application was received, the prosecution file was not yet closed, and judicial appeal periods were still open. In keeping with the intent of the legislation, although excluded from the Act, for continuity the applicant was provided with information he had*

already provided to or received from the department and that which was publicly available [S.4(2)(a)(b)].

. . .

As indexes and pagination of responses are not considered by the Act, they will not be addressed as part of the review, other than to indicate that the department attempted to meet the requests of the Review Office as reasonably as possible under the Act and in keeping with operational constraints of the department.

While the *Act* is silent on indexes and pagination as Labour points out, statutory administrative bodies are fully expected and allowed to read in certain processes and procedures in order to make the statute operational and to give meaning to best practices. This is a given and is totally appropriate. After over four years as Review Officer I am frustrated by the continued resistance by *a limited number* of public bodies to incorporate best practices that are well-established in most Canadian jurisdictions such as providing an Index particularly for a large complex record such as in this case.

I make four Findings in this regard. I find that Labour partially met the statutory duty to assist by waiving the application and processing fees for the Applicant. I also find that Labour assisted by providing information to the Applicant that s/he had already provided to or received from Labour to avoid the absurd result consequence. I find, however, that Labour failed in its decision letters to give any comprehensive reasons or indication how it exercised its discretion as required by the *Act*. I also find that its failure to provide an Index in this case to be most importantly a breach of a promise to do so which it made on at least ten separate occasions. Because of the Record's size and the disorganized manner in which it was produced and provided to the Applicant and the Review Office, this failure was unhelpful and completely inappropriate.

ISSUE #18: Section 31 – Public Interest

Section 31 of the *Act* contains a public interest provision, which acts as an over-ride where it is in the public interest to release information that would normally be appropriately exempted. It would seem that providing access to records related to an OHS investigation and the decision not to proceed with a prosecution where an applicant is left with questions regarding the matter and where the information may be used to pursue other avenues available, could fit into the realm of public interest.

In Review Report *FI-08-107*, I raised the idea that public interest could be argued based on the type of record justifying its consideration. The concept of public interest does not only have to apply where the greater public has interest in a particular record or subject matter but also where the disclosure of certain kinds and types of information would be of public interest as a matter of principle. That means that while the public may not have an interest in this particular investigation Record, the public may well have an interest in knowing that in future cases, this kind of record will be made available to those impacted by its findings and results. In the recent Review Report *FI-10-26*, I had the following to say about a situation where public interest can be served when disclosure is provided to just the Applicant:

In addition, it is reasonable to assume that the general public would be interested in any applicant being given access to documents that helps to correct the power imbalance in a situation where the public body has control of all of the information involving such a sensitive matter and the affected person has no information or does not know what information s/he has or does not have. To keep such information from a person who has a right under the Act to access his/her own personal information, when a public body has not proven exemptions apply, does not serve the public interest, it serves the public body's interests.

In the Investigation Summary, the Review Office provided an overview of public interest and invited both the Applicant and Labour to consider public interest by stating:

No determination has been made on the applicability of this section. I am presenting it for both parties to consider and to provide their thoughts, for the Review Officer's consideration, on whether or not public interest is a factor in this case.

While s/he did not address the issue of public interest directly, the Applicant did make it clear that there had been some media interest in the story, that this was about a potential hazard in a workspace and that as a member of the public s/he was entitled to know why the prosecution arising from his/her complaint was abandoned.

Labour should have been aware of the importance of the information in the Record to the Applicant. If it was not, either discussions with the Applicant under its duty to assist or reading the Record thoroughly would have made this clear. I find in this case that Labour, when exercising its discretion under all the discretionary exemptions, failed to consider the public interest in the Applicant needing to know as much information as possible in such circumstances. Labour should be aware of this need to know particularly as Labour represented its mandate to be responsibility for safety in the workplace. I find factors such as compassion, necessity, fairness and clarity all should have been considered by Labour in exercising its discretion taking into account public interest.

ISSUE #19: In-camera and Exchange of Representations

In its June 25, 2010 Representations at the time of making Decision #2, Labour indicated that it did not want its Representations to be shared without its prior consent. Labour's letter stated:

Please note that the comments and responses contained in this letter are for the purpose of the Review Office only and are not meant to be disclosed in full, or part, to the applicant without prior notice to myself.

This amounts to making a Representation in-camera. Because of regular misunderstanding or misuse by public bodies, I recently made it clear the process by which a public body can make such a request of the Review Officer. In *FI-08-104* I stated:

In-Camera Representations

On March 14, 2011 Service NS made a request for its Representations to be held "in-camera." This request by Service NS is worded as a demand rather than a request to the Review Officer. Section 37(1) of the Act provides as follows:

> ***The Review Officer may** conduct a review in private.*
> ***[Emphasis added]***

It should be noted that in correspondence to Service NS on December 17, 2010 the Review Office advised Service NS that the decision to accept a Representation "in-camera" would be up to the Review Officer during the formal Review and restricted to "some information that is relevant but cannot be shared with the Applicant." [Emphasis added]

A public body may make a request to the Review Office to go in-camera at any time during a Review. Whether that request is accepted is wholly within the discretion of the Review Officer. Common sense would dictate that it would be advisable for public bodies to request the opportunity to be heard in-camera in a mode outside of its actual Representations. To proceed as Service NS did risks that I will find no reason to go in-camera and exercise my discretion to make the Representations known in the Review Report. This is particularly the case where, as here, the Representations did not contain anything that could in any way whatsoever compromise the continuing legal proceedings or disclose the content of the Record.

Section 37(3)(b) goes on to provide:

***The Review Officer may** decide . . .*

(b) whether a person is entitled . . . to comment on representations made to the Review Officer by any other person.
[Emphasis added]

Again, the statute makes it clear who is the decision-maker about who gets to see what. It is for the Review Officer to decide if Representations from one party are to be shared with another. It is not for a public body to dictate to the Review Officer that its Representations are to be kept secret from the Applicant. I find it is certainly open to Service NS to request to go in-camera or for its Representations not to be shared with the Applicant but at the end of the day the Review Officer will decide.

This is not a minor procedural matter. Access to information has been recognized as a quasi-constitutional right *[CBC v. Canada (Information Commissioner)]*. For the Review Officer or any other Commissioner as an independent oversight body to be shifting into in-camera hearings erratically, particularly on demand from a public body in a Review would be a gross error. Fundamental to our work is to operate in a manner consistent with the purpose of the statute independently, impartially and fairly. Thus while the legislation enables me to hear matters in private, it must remain within my discretion to ensure that the circumstances justify it. In exercising my discretion to receive Representations in-camera, I will consider factors such as whether the disclosure of the Representations will reveal any part of the Record or whether disclosure of the Representation will cause harm.

Labour marked most of its Representations not to be shared and thus insisting they be treated as if provided "in-camera." In this instance, the Representations have not been reproduced. Having said that, unless a public body clearly requests its Representations to be considered in-camera by the Review Office at any time during the Review *and I provide my approval*, in the future, I will not treat any Representations as provided in confidence. In future, if Labour does not follow the request process outlined in *FI-08-104*, its Representations will not be considered in-camera under s. 37(1) of the *Act*.

In addition, Labour stalled providing its Representations when requested to do so by the Review Office electing to hold off until at the Formal Review stage to do so. This is not appropriate. Throughout the course of a Review, as issues arise, the Review Office staff acting under their specific delegations from me under the legislation may request Representations at pivotal moments. It is not up to a public body to refuse to do so and will result in further delay and possibly a missed opportunity for informal resolution or Mediation. The Review Office has the statutory authority to conduct Reviews in accordance with the governing statute and in order to do that we require information. A refusal to provide Representations on request stonewalls the Review Office's opportunity to fulfill its statutory mandate. I find Labour has not complied with requests to provide Representations to the Review Office in a timely manner and has chosen to disregard the delegated authority given to the Review Office team.

On August 24, 2011, in anticipation of its Representations for the formal Review, Labour was asked the following questions – *[Labour's response is included with the list in italics]:*

1. How does the page numbering machine work? – *Not answered.*
2. Why was the Applicant's copy not numbered? – *Not answered.*
3. Did you notice that in a number of instances where pages are missing from the actual documents? – *Not answered.*
4. If yes to #3, what steps did you take to ensure that you had a complete copy of the Record? – *Not answered.*
5. Are you confident that, other than sporadic missing pages, a complete search has been done? – *Not answered in response to direct questioning, but see Representations referencing "prepared for court."*
6. If yes to #5, how was the search that was conducted? – *Not answered.*
7. Did Labour seek consent of the third parties whose personal information has been severed? – *Not answered.*
8. If yes to #7, please provide a copy of the letter to them, a copy of what was provided for them to consult on and a copy of their response. – *Not answered.*
9. If no, to #7, please explain why this was not done. – *Not answered.*
10. Given the information about delay, is there any information that Labour would like to provide at this time? – *Not answered.*
11. Given the information about duty to assist, is there any information that Labour would like to provide at this time? – *Not answered.*
12. Given this information about public interest, is there any information that Labour would like to provide at this time? – *Not answered*.

Given Labour's unilateral decision to delay its Representations until the formal Review stage, I am baffled by the lack of information Labour provided during the formal Review stage. I am bewildered that Labour did not avail itself of the detailed direction in the Investigation Summary as to what was absolutely necessary to address in the Representations particularly

where no explanation had been provided to the Applicant as to how and where the exemptions applied. I find there to be considerable confusion about the Review process and, in particular, the burden on Labour throughout the process to meet the onuses set by the statute. It appears Labour has totally disregarded the Investigation Summary provided for the primary purpose of assisting parties in preparing final Representations. I find Labour incorrectly takes the position that it determines what is at issue and when and how to respond in a Review.

FINDINGS

1. I find that the Applicant has not received an "open, accurate and complete" decision, which may result partly from an incomplete search. The *Act* requires a public body to "make every reasonable effort to assist the applicant and to respond without delay, openly, accurately and completely."
2. Where exemptions are relied upon and portions of the Record severed, I find that Labour has not provided any explanation as to how it exercised its discretion.
3. I find in this Review Labour did put its mind to preparing an Index, was granted time extensions based on its representation that it needed time to prepare the Index and finally reneged on its promise to provide an Index that would not only have been prudent but ***in this case absolutely necessary***.
4. I find that by not retaining a copy of the severed Record sent to the Applicant, Labour appears to be in violation of the *Government Records Act* and, thus, is not in compliance with the *Standards for Administrative Records* for administrative records belonging to a public body of the government of Nova Scotia.
5. On a review of the entire Record, I find that the Applicant has not received an "open, accurate and complete" decision as a result of the way in which the Record has been prepared or produced as it does not meet that test of accurate and complete.
6. I find that had Labour, three years ago, created and Index *as it promised to do repeatedly*, assigned particular exemptions to particular parts of pages in the Record, three things may have been accomplished: the Applicant would understand what and why portions of the Record had been withheld and thus Labour would have met its duty to assist; both the Applicant and the Review Office would have been able to understand why hundreds of pages appear to be missing; and the Review Office would have been better able to guide the Applicant and Labour to a narrowed Review scope and a possible informal resolution. Further, I find that the kind of blanket application of multiple exemptions is not the appropriate manner in which to redact a record.
7. Labour has not addressed any part of the test under s. 13(1) of the *Act*, and it is completely unclear to which part of the Record Labour is attempting to apply s. 13(1). I find Labour has failed to prove that the disclosure of information would reveal the substance of Executive Council deliberations.
8. I find Labour has failed to provide anything to show that the definition of advice has been met and has failed to file any evidence that advice was sought or anticipated or to name anyone who was given the advice who could take action with respect to that advice.
9. The onus is on Labour to show (1) what law enforcement matter is affected; (2) identify the harm; and (3) directly connect the disclosure with the contemplated harm. While there was an investigation and a proposed prosecution that did not proceed, both were concluded prior to Labour making Decision #1 and its first release of the severed Record. In any event, and this applies equally to the discussion below for Issues #7 and #8, I find

that Labour has failed to provide any details to meet the "expectation of harm test", which is an essential element.

10. I find the onus is on Labour to show how the disclosure of information would reveal information about prosecutorial discretion [such as decisions that were made] and I find Labour has failed to meet this onus.
11. I find Labour appears to have misunderstood the *status quo* at the time of the original Application for Access to a Record in relation to the fact that the investigation was finished and the prosecution withdrawn. I find Labour has failed to demonstrate how the fair trial exemption applies to any part of the Record.
12. I find the onus is on Labour to provide (1) evidence that the Record is in a law enforcement record and (2) the name and section of the enactment that makes disclosure an offence and Labour has failed to meet this onus.
13. I find Labour has failed to show how the release of any part of the Record could reasonably be expected to expose anyone to civil liability.
14. Labour is relying on the litigation branch of solicitor-client privilege because it referred to advice with respect to a pending prosecution. I find that Labour has failed to provide any evidence to demonstrate any portion of the Record falls within the communication branch of solicitor-client privilege.
15. I find that when a decision was made not to proceed with prosecution and charges dropped, the solicitor-client privilege exemption was no longer available to Labour.
16. In cases where parts of the Record are personal information, I find Labour should have claimed s. 20, an exemption that allows for personal information to be severed, rather than using "not applicable" as if it were an exemption.
17. I find that records management starts with the creation of a record and those working for public bodies should be cognizant of what is documented in a record. When communicating by e-mail about core business, public servants need to be cautious to restrict e-mail to the business matter at hand or risk personal discussions being made public.
18. I find Labour has erred on the side of withholding information in exercising its discretion.
19. I find that Labour cannot apply any of the discretionary exemptions claimed to any part of the Record.
20. I find that Labour has failed to demonstrate how all three parts of the s. 21 exemption apply to the Record.
21. I find the delay of three years since Labour received this Application for Access to a Record from the Applicant was excessive and could have been significantly reduced by the preparation of an Index and attention to detail in preparing the Record [line-by-line review] and noting exemptions and parts thereof for the Applicant.
22. I find Labour continues to show a lack of respect for applicants' fundamental right of access to information guaranteed by the *Act* and as interpreted by the Courts. I also find Labour continues to show a blatant disregard for the Review process as an independent impartial oversight body that has the statutory authority to Review its decisions under the *Act.*
23. I find that Labour partially met its statutory duty to assist by waiving the application and processing fees for the Applicant. I also find that Labour assisted by provided information to the Applicant that s/he had provided to or received from Labour to avoid the absurd result consequence. However, I find Labour failed in its decision letters to give any comprehensive reasons or indication how it exercised its discretion as required by the *Act.* I also find that Labour's failure to provide an Index to be most importantly a

breach of promise to do so which it made on at least ten separate occasions. Because of the Record's size and the disorganized manner in which it was produced and provided to the Review Office, this failure was unhelpful and completely inappropriate.

24. I find that when exercising its discretion under all discretionary exemptions, Labour failed to consider the public interest in the Applicant needing to know as much information as possible in such circumstances. Labour should be aware of this need to know particularly as Labour represented its mandate to be a responsibility for safety in the workplace. I find Labour should have considered factors such as compassion, necessity, fairness and clarity in exercising its discretion taking into account public interest.
25. I find Labour has not complied with requests to provide Representations to the Review Office in a timely manner and it has chosen to disregard the delegated authority given the Review Office team.
26. I find there to be considerable confusion about the Review process and in particular the burden on Labour throughout the process to meet the onuses set by the statute. It appears Labour has totally disregarded the Investigation Summary provided for the primary purpose of assisting parties in preparing final Representations. I find Labour incorrectly takes the position that it determines what is at issue and when and how to respond in a Review.

RECOMMENDATIONS

I make the following Recommendations to Labour:

1. Release to the Applicant all information withheld under exemptions for which Labour did not meet the onus to withhold, which includes all instances of the following: s. 13(1) [cabinet deliberations], 14(1) [advice and recommendation], all of s. 15 including 15(1)(a) [law enforcement], (d) [confidential sources], (f) [prosecutorial discretion], (g) [fair trial] and 15(2)(a) [offence], (b) [civil liability], 16 [solicitor-client], 21 [trade secrets].
2. Provide the Applicant with copies of all the missing pages that were outlined in the Appendix provided to Labour by the Review Office Director on September 14, 2011.
3. Review all information marked as "not applicable" and release all responsive portions of that information to which no exemption applies. Where an exemption such as s. 20 applies, note that on the severed Record with an explanation.
4. Specifically release to the Applicant the complete unsevered expert's report [ensure all pages are included in the release as there were three pages missing even in the copy provided to the Review Office].
5. Make every effort to resource the FOIPOP office adequately and appropriately particularly when the FOIPOP Administrator is unavailable for a variety of reasons where those reasons do not relate to operational requirements.
6. For all future Applications for Access to a Record, Labour adhere to the record retention schedule set out by statute and in STAR [the Standard for Administrative Records - Information Management Group 5200 -30], Information Access and Privacy Management and retain a copy of all versions of a record provided to the applicant, third parties and the Review Officer.

7. Provide the Review Office with a complete copy of the Record provided to the Applicant in response to these Recommendations.

Respectfully,

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