



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-09-29(M)

Report Release Date: July 19, 2012

Public Body: Cape Breton Regional Police Service

Record at Issue: Pursuant to s. 491 of the *Municipal Government Act* [“*MGA* ”], the Cape Breton Regional Police Service [“Police Service”] has provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the 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 or any other person by the Review Officer or her delegated staff.

The Record at issue in this Review is all the information related to a motor vehicle accident for which the Police Service has custody or control. The parts of the Record that have been withheld contain personal information of third parties including:

- Names of private citizens [witnesses interviewed by the Police Service]
- Names of professionals
- Addresses [private citizens]
- Phone numbers [private citizens]
- Dates of birth [private citizens]

This information was withheld under s. 480 of the *MGA*. The Police Service initially cited s. 475 of the *MGA* but later withdrew reliance on that exemption.

The Applicant has indicated in the Review that s/he is seeking access to all severed information – “full disclosure of [the] complete file.”

- Issues:**
1. Whether the Police Service fulfilled its statutory duty to assist the Applicant in accordance with s. 467 of the *MGA*.
 2. Whether the Police Service fulfilled its obligations regarding notice to third parties in compliance with s. 482 of the *MGA*.

3. Whether the Police Service could transfer the Application for Access to a Record to another public body.
4. Whether the Police Service has improperly deferred to the Review Officer and/or the Courts.
5. Whether s. 98(7) of the *Motor Vehicle Act* is relevant to or applies to the information contained in the Record.
6. Whether the Applicant has met the burden of proof that third party personal information should be disclosed because such disclosure would not be an unreasonable invasion of a third party's privacy.
7. Whether the Police Service can deny access to the Record on the basis that the information is partially or fully available through another process, such as partly through the Courts.

Key Words: addresses, burden, consent, Court, custody and control, damages, date of birth, deceased, duty to assist, employee, liable, motor vehicle accident, name, onus, paramount, personal information, phone number, police, presumption, record, third party, unreasonable invasion, witness.

Statutes Considered: *Part XX of the Municipal Government Act ss. 461(f), 462, 464A, 465(2), 467(2)(e), 470(1), 475(1)(c), 475(2)(b), 480, 480(2), 480(2)(c), 480(4), 480(4)(e), 482(1), 482(1A).*

Case Authorities Cited: *Re House, SH No. 160555 (NSSC). FI-09-40; ON Order P-651.*

Other Cited: *Freedom of Information and Protection of Privacy Act, Stats NS 1993, c.5, ss. 20, 20(4)(e); Motor Vehicle Act RSNS 1989, c. 293, ss. 98(1), 98(6), 98(7), 98(7)(a)-(h); Civil Procedure Rule 14.12.*

REVIEW REPORT FI-09-29(M)

BACKGROUND

On September 8, 2008 the Applicant made an Application for Access to a Record to the Cape Breton Regional Police Service ["Police Service"] for information pursuant to *Part XX of the Municipal Government Act (Freedom of Information and Protection of Privacy)* ["MGA "] as follows:

All information with respect to a Motor Vehicle Accident which occurred on [date] & [time] on [location] involving a [vehicle description] driven by [the Applicant (DOB)] and [name of victim (DOB)] investigated by [Police Officer] of the CB Regional Police Service [number].

On October 27, 2008 the Police Service made a decision in response to the Application for Access to a Record. The following constitutes the complete decision letter:

*A review of your application has been completed and the attached **edited** documentation is being released.*

[A numbered brief description of 42 items in the Record of various page lengths is listed in the letter.]

*This concludes our review of this file.
[Emphasis added]*

The original decision letter did not make reference to any exemptions in the *MGA* with respect to the severances and rather refers to the Record as “edited.” The Police Service did not provide any explanation as to how the sections of the *MGA* applied to the redacted portions of the Record and did not provide any reasons for its decision. The letter did not advise the Applicant of his/her right to file a Request for Review with the Review Officer.

On November 6, 2008 the Applicant wrote back to the Police Service regarding its decision indicating that it was so “intensely” edited it was of “limited value.” The letter specifically identifies what the Applicant considers relevant facts: the purpose for making the Application for Access to a Record – to be able to properly defend against a civil action; the reason why information should not have been severed; the third party notice requirements of the *MGA*; and what appears to be a missing document. The letter includes a request for the Police Service to “reconsider this matter and provide the names of the witnesses and their contact information as contained in the witness statements.”

On February 13, 2009 [150 days after the Application for Access to a Record was made], the Police Service’s FOIPOP Administrator affirmed its original decision and went on to state the following:

In relation to your request for us to reconsider our decision, we’ve reviewed your points and although we appreciate your perspective we are going to stand by our original decision on disclosure again noting the provision of the severed documents we provided on October 27th.

The application to the Court for further disclosure of the severed information is certainly an option for you. On matters which are leading toward civil litigation, the Police will be happy to respond to any directives from the Courts, but voluntarily providing such personal information via FOIPOP would not be our practice.

To formalize the rationalization for our partial disclosure of the requested information, I bring your attention to the following sections of the Municipal Government Act: 465(2), 475(1)(c), 475(2)(b), 480.

Finally, relating to the direction referred to in Constable [last name’s] report, that document was not in our control when the original request came in. I am not aware of its current status and that would probably be a matter for a fresh application.

The Police Service's second decision informed the Applicant what specific exemptions had been claimed and about his/her right to file a Request for Review but did not provide reasons for its decision to deny access to part of the Record.

On March 18, 2009 a Request for Review (received March 23, 2009) was filed by the Applicant with the Review Officer as follows:

The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body:

The decision of [FOIPOP Administrator] dated the 13th day of February, 2009, which refused to disclose significant portions of the requested material. A copy of the decision is attached to this Request for Review.

The applicant requests that the review officer recommend the following:

The Cape Breton Regional Municipality[Cape Breton Regional Police Service] provide full disclosure of its complete file, including all information that has been severed and redacted, regarding the motor vehicle accident that occurred on [location] in the CBRM [Cape Breton Regional Police Service] on [date].

On March 31, 2009, the Review Office wrote to the Police Service indicating that a complete copy of the Record, identifying all severances with highlighting, as well as a copy of the redacted Record be provided within 15 days of receipt as required by the Regulations.

On June 17, 2009 [78 days after the Review Office's request], the Police Service provided a copy of the complete Record and a copy of the redacted Record it released to the Applicant. During the Review a copy of the redacted Record was provided to the Review Officer by the Applicant. It did not match the copy of the same provided to the Review Officer by the Police Service.

On January 19, 2011, the Police Service withdrew reliance on all exemptions except s. 480 of the MGA.

On May 18, 2012, the Applicant and the Police Service were provided with a copy of the Investigation Summary and provided the opportunity to make final Representations for the formal Review.

On June 5, 2012 the Police Service requested an extension in providing its final Representations that were due June 6, 2012. The Police Service was given an extension until June 15, 2012 and its response was received June 18, 2012.

As the formal Review stage began, I discovered that one responsive document, which was referred to in the Record and that formed part of the Record, had never been received by the Review Officer for which the Police Service had never provided the Applicant with a decision for. Initially, in February 2009, the Police Service advised the Applicant

that it did not have control of the document. Upon being asked about this part of the Record, the Police Service acknowledged it did have the document at the time of the previous inquiry.

The document in question was dated prior to the date on the Application for Access to a Record, was responsive to the Application for Access to a Record and had been in the Police Service's custody or control since 2008 though the FOIPOP Administrator believed he was still awaiting its completion. I directed the Mediator/Investigator to contact the Police Service and advise it to do the following: make a decision with respect to this part of the Record, advise the Applicant of its decision regarding release and provide a complete copy of the outstanding part of the Record to the Review Officer and a copy of this part of the Record as it was released to the Applicant. Given the lateness of this discovery, I asked the Police Service to respond to this matter and issue a decision to the Applicant promptly, which it did. The Police Service provided partial access to one document, which had already been disclosed with minor different severances and denied access in full to a second new document, citing s. 480(3)(a) of the *MGA*.

RECORD AT ISSUE

Pursuant to s. 491 of the *MGA*, the Police Service has provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the 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 or any other person by the Review Officer or her delegated staff.

The Record at issue in this Review is all the information related to a motor vehicle accident for which the Police Service has custody or control. The parts of the Record that have been withheld contain personal information of third parties including:

- Names of private citizens [witnesses interviewed by the Police Service]
- Names of professionals
- Addresses [private citizens]
- Phone numbers [private citizens]
- Dates of birth [private citizens]

This information was withheld under s. 480 of the *MGA*. The Police Service initially cited s. 475 of the *MGA* but later withdrew reliance on that exemption.

The Applicant has indicated in the Review that s/he is seeking access to all severed information – “full disclosure of [the] complete file.”

ISSUES UNDER REVIEW

1. Whether the Police Service fulfilled its statutory duty to assist the Applicant in accordance with s. 467 of the *MGA*.
2. Whether the Police Service fulfilled its obligations regarding notice to third parties in compliance with s. 482 of the *MGA*.
3. Whether the Police Service could transfer the Application for Access to a Record to another public body.

4. Whether the Police Service has improperly deferred to the Review Officer and/or the Courts.
5. Whether s. 98(7) of the *Motor Vehicle Act* is relevant to or applies to the information contained in the Record.
6. Whether the Applicant has met the burden of proof that third party personal information should be disclosed because such disclosure would not be an unreasonable invasion of a third party's privacy.
7. Whether the Police Service can deny access to the Record on the basis that the information is partially or fully available through another process, such as partly through the Courts.

The majority of these issues have been amply canvassed in the Investigation Summary prepared and shared with both parties by the Review Office. Both the Applicant and the Police Service have been given the opportunity to submit Representations in response to the Investigation Summary, which they have done. I have reviewed all of the Representations received from the Applicant and the Police Service, both oral and written, and reviewed all relevant considerations arising during all phases of the Review.

FINDINGS:

ISSUE # 1 – STATUTORY DUTY TO ASSIST

- 1) I find the Police Service released a substantial amount of information in the part of the Record disclosed. Some of the personal information the Police Service released could have properly been withheld. The only portion of the Record at issue, however, is the Police Service's decision with respect to redacting third parties' personal information.
- 2) I find that the Police Service contravened s. 467(2)(e) of the *MGA* by failing to advise the Applicant of his/her right to file a Request for Review with the Review Officer in its decision letter. In all decisions made under the statute, the Police Service must inform the Applicant of his/her right to appeal to the Review Officer. The Police Service should always respect this basic right of the Applicant to be advised of his/her avenue of appeal. This mistake was corrected in Police Service's subsequent decision letter to the Applicant.
- 3) I find that the Police Service contravened s. 467(2)(a)(ii) of the *MGA* by failing to provide the reasons for the refusal and the provision in the *MGA* on which the refusal to disclose is based. As the Applicant stated in his/her Representations: "No reasons were provided for the [Police Service]'s failure to provide full disclosure."
- 4) If, as the Police Service claims, it was not aware the outstanding part of the Record was the part of the Record in which the Applicant was most interested, I find the Police Service has failed in its duty to assist in responding to the Application for Access to a Record *without delay, openly, accurately and completely* in contravention of s. 467(1)(a) of the *MGA*. It is part of the duty to assist to take all reasonable steps to understand what the Applicant is attempting to access. The companion obligation rests with the Applicant to make his/her

request clear to the Police Service, which, in this case, I find the Applicant did more than adequately.

Where the Police Service believes [albeit wrongly] that a record is not in its custody or control, part of its statutory duty to assist under s. 466(1) of the *MGA* is to advise the Applicant accordingly. I find that when it discovers that it in fact has custody or control of a record, the Police Service must provide a copy to the Review Officer immediately, make a decision to the Applicant and, where appropriate, release all or part of the Record to the Applicant. The Police Service represented that regardless of when it provided this portion of the Record, at the outset or at the conclusion, its decision with respect to refusing access to the entire part of the Record would be the same. I find that whether or not its decision with respect to this newly discovered part of the Record will be the same is immaterial to the Police Service's duty to complete these steps.

5) Continuing on with the Police Service's obligations under the statutory duty to assist cited in Finding #4 above, I find the Police Service did not exercise due care and attention to both search and compilation of the complete Record. Some of the evidence upon which this finding is based is as follows:

- The copy provided by the Police Service to the Review Officer included 30 pages not found in the Index or the Applicant's copy.
- The copy provided by the Applicant included 6 pages of photos found in the Index but not found in the copy provided by the Police Service.
- A portion of the Record provided at the formal Review stage had already been provided to the Applicant but the redaction of the Record was slightly different than in the original copy given to the Applicant with no explanation for the change.
- The Police Service failed to provide a copy and make a decision about a document that was in the Police Service's custody and control since May 2008, which was not produced until July 2012.

ISSUE # 2 – NOTICE TO THIRD PARTIES

6) When it made its initial decision, the Police Service chose not to contact all the named individuals whose personal information had been withheld. Pursuant to s. 482(1A) of the *MGA*, the Police Service was not required to give notice to third parties seeking their consent if it had no intention of releasing the severed portion of the Record. However, the Police Service failed to provide any Representation as to how it came to this determination. The provision requires the Police Service to *examine the request, the relevant records and the views or interests of the third party*. This step is required prior to coming to the decision not to contact the third parties. The only factor the Police Service alluded to was that the Applicant could get the information through the Courts, which I find is not evidence that the Police Service met the test of examining the views or interests of the third parties. I find, therefore, that the Police Service did not follow the relevant statutory test and made an arbitrary decision not to give notice and seek third parties' consent.

However, in this case mid-Review, the Police Service inquired whether or not it should be giving notice to the third parties. If in fact the Police Service was

making that proposal because it was prepared to modify its initial decision and consider seeking consent and releasing the third party personal information, then s. 480(1) of the *MGA* would be triggered. At the point where it made that decision *to give notice and to seek consent*, the Police Service would give the third parties notice promptly and release the information to the Applicant where consent from the third parties was obtained pursuant to s. 480(4).

In this Review, while the Police Service inquired during the Review whether or not it should be giving notice to the third parties, at no point had it given any indication that it was doing so with a view to considering disclosure.

I find the Police Service's inquiry seemed confined to the issue of *requiring notice* and not giving notice with a view to seeking the *consent* of the third parties. I find that had the Police Service made a decision to disclose, then and only then would the Police Service have been required to give notice in accordance with the requirements as set out in s. 482(1) of the *MGA*. In that case, to further the interests of access to information based on third party consent, the Police Service would have asked the Applicant if s/he was prepared to have his/her identity made known to the third parties, which in this case, the Applicant had clearly agreed to do.

ISSUE # 3 – TRANSFER REQUEST TO ANOTHER PUBLIC BODY

- 7) The Police Service suggested that had it been aware this part of the Record was what the Applicant was most interested in, it would have transferred the request to the Medical Examiner. In this regard I make two findings. First, I find that that it is not possible under the *MGA* for the Police Service to transfer to the Medical Examiner that falls under the auspices of the Department of Justice because under s. 470(1) of the *MGA* transfers can only be made to other municipal bodies.

470 (1) Within ten days after a request for access to a record is received, or such longer period as the review officer may determine, the responsible office of a municipality may transfer the request and, if necessary, the record to a municipal body to which the municipality appoints one or more members and which is not under the authority of the municipality, ...

The second finding is that it would have not been appropriate for the Police Service to force the Applicant to file a new Application for Access to a Record with the Medical Examiner when the Police Service had custody and control of the complete Record making it imperative that it process the application. The responsive Record was in the custody and control of the Police Service and regardless of who else may have all or portions of the Record, it was under a duty to process the Applicant's Application for Access to a Record accordingly. Out of courtesy, the Police Service could have informed the Applicant that part of its Record could also be in the custody and control of another public body and advise that it was open to him/her to file a second Application for Access to a Record with that other public body. This assistance by way of advice to the Applicant, however, in no way alters the Police Service's responsibilities in relation to this Record and the Applicant's Application for Access to that Record.

ISSUE # 4 – POLICE DEFERRING TO REVIEW OFFICER AND/OR COURTS

- 8) The *MGA* clearly sets out the role of municipalities, in the same fashion as the *FOIPOP Act* sets it out for public bodies, within the administrative scheme of processing citizen's right to access information. *Responsible officers of municipalities or their delegated authorities are given the authority to make decisions under the statute: to release or withhold all or part of a Record and to apply limited and specific exemptions in doing so. In its Representations, the Police Service documented its position in that regard when it stated, for example:*

The CBRM [Cape Breton Regional Police Service] would have no hesitation in providing the information if directed by the Courts. [W]e look forward to the Review Officer's responses to the comments we offer below.

It will only be my intention to further involve the CBRM [Cape Breton Regional Police Service] legal department after we receive the recommendation of the Review Officer.

[W]e will rely on the review of the file by the Review Officer and her recommendation to guide us to hopefully a successful resolve to this request.

I find for the Police Service to make a decision that contains little specifics for the Applicant and then to defend that decision by simply deferring to the Review Officer or the Courts, awaiting our decision to “tell the Police Service what to do”, renders the entire purpose of the legislation meaningless, inoperative and significantly dilutes a citizen's right to access information.

In addition, by constantly deferring to the Courts or to the Review Officer, I find the Police Service stalled all possibilities of early resolution to the Review and ignored the fact that the Review Officer's staff members have specific delegations authorizing them to pursue informal resolutions at all stages of the Review process up to a formal Review.

ISSUE # 5 – RELEVANCE OF SECTION 98 THE MOTOR VEHICLE ACT

- 9) The test for determining whether or not release of third party personal information is an unreasonable invasion of privacy has been established by the Nova Scotia Supreme Court in *Re House, SH No. 160555*. The Review Officer has consistently cited this test when determining the application of s. 480 of the *MGA*. Note that in *Re House* the Supreme Court was examining the provincial *Freedom of Information and Protection of Privacy Act [FOIPOP]*, rather than its municipal counterpart, the *MGA*. Section 480 of the *MGA* is practically identical to s. 20 of *FOIPOP* and for ease of reading and clarity the following has been edited to refer to the analogous *MGA* sections rather than *FOIPOP* that were at issue in *Re House*. Following on the reasoning from *Re House* the analysis is as follows:

1. *Is the requested information "personal information" within s. 461(f)? If not, that is the end. Otherwise, we must go on.*

2. *Are any of the conditions of s. 480(4) satisfied? If so, that is the end of the analysis.*

In the case at hand, following the first two steps of the *Re House* decision, the analysis is as follows:

- a) Parts of the Record that have been withheld include:
- Names of private citizens [witnesses interviewed by the Police Service]
 - Names of professionals
 - Addresses [private citizens]
 - Phone numbers [private citizens]
 - Dates of birth [private citizens]

all of which, I find fall clearly within the definition of personal information in s. 461(f) of the *MGA*.

- b) Section 480(4) of the *MGA* reads in part as follows:

A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(c) an enactment authorizes disclosure;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a municipality;. . .

This involves a two part discussion. The first is with respect to whether or not an enactment authorizes disclosure. The *Motor Vehicle Act* stipulates the reporting requirements when an accident has occurred causing injury or death. The relevant portions are as follows:

98 (1) The driver of a vehicle involved in an accident resulting in injury or death to any person, or property damage to an apparent extent of one thousand dollars or more, shall, within twenty-four hours,

(a) if the accident takes place within a city or incorporated town, forward a written report of the accident, or report the accident in person to the Registrar, or to the nearest detachment of the Royal Canadian Mounted Police, or to the chief of police or any regular member of the police force of the city or incorporated town;

(6) Except as provided in subsection (7), all reports made pursuant to the provisions of this Section shall be for the information only of the Registrar, the Department or the police force to which they are made and no such report or any part thereof or any statement contained therein shall be open to public inspection or admissible in evidence in any trial, civil or criminal, arising out of such accident except as evidence that

such a report has been made or in connection with a prosecution for making a false statement therein in violation of subsection (11).

(7) Where a person or an insurance company has paid or may be liable to pay for damages resulting from an accident in which a motor vehicle is involved, the person and insurance company and any solicitor, agent or other representative of the person or company who is thereunto authorized by the person or company in writing, is entitled to access to any such reports for the purpose of obtaining therefrom information in respect of

- (a) the date, time, and place of the accident;***
- (b) the identification of vehicles involved in the accident;***
- (c) the name and address of any parties to, or involved in, the accident;***
- (d) the names and addresses of witnesses to the accident;***
- (e) the names and addresses of persons or bodies to whom the report was made;***
- (f) the names and addresses of any police officer who investigated the accident;***
- (g) the weather and highway conditions at the time of the accident;***
- (h) the estimate of the damage to any vehicle involved in the accident.***

[Emphasis added]

The *MGA* lists s. 98(6) of the *Motor Vehicle Act* as a provision that restricts access to information that prevails over the right to access to information provided for in the *MGA*. However s. 98(6) states *except as provided in subsection (7)*, which clearly provides that where a person has paid or may be liable to pay for damages resulting from an accident access to any reports prepared under s. 98(7) is authorized for that person and his/her solicitor. The type of information that will be contained in the reports is specified in s. 98(7)(a) through (h) of the *Motor Vehicle Act*.

This list includes the names and addresses of witnesses and parties to the accident, which, in this case, is the information that has been severed from the Record at issue. The subsection should not be narrowly interpreted to include only those persons who literally witnessed the actual and entire accident. I find the person liable for damages resulting from a motor vehicle accident and his/her solicitor are given the right to some personal information [names and addresses] of any person from whom the police took a statement [witness] or was a party [the deceased]. Who the Police Service considered to be witnesses or parties to the accident is clearly evident in the Record.

Section 464A of the *MGA* provides for when certain statutes may prevail over access to information legislation. In other words, the *MGA* makes provision for when, in the case of a conflict with another enactment, which will be paramount. It refers to the *Motor Vehicle Act*, as follows:

464A (1) Where there is a conflict between this Part and any other enactment and the other enactment restricts or prohibits access by any person to a record, this Part prevails over the other enactment unless subsection (2) or the other enactment states that the other enactment prevails over this Part.

(2) The following enactments that restrict or prohibit access by any person to a record prevail over this Part: . . .

(k) subsection 98(6) of the Motor Vehicle Act;

Section 464A(1) of the *MGA* applies when another statute restricts or prohibits disclosure. This means that information normally disclosed under access to information legislation cannot be disclosed if the other statute says it cannot. Section 98(6) of the *Motor Vehicle Act* specifically provides an example of when information cannot be disclosed.

Section 98(7) of the *Motor Vehicle Act* outlines specific information contained in accident reports that is required to be provided to an individual who has paid or may be liable to pay for damages resulting from an accident. It does not authorize the disclosure of the reports filed with the Registrar in their entirety. I find that the person [and his/her solicitor] who may be liable is “entitled to access to any such reports for the purpose of *obtaining therefrom information* in respect of” specified details like witnesses’ and parties’ names and addresses.

I find, however, to disclose the entire reports that were filed with the Registrar would infringe s. 98(6) of the *Motor Vehicle Act*, which, by virtue of s. 464A of the *MGA*, is paramount.

Section 480(4)(c) of the *MGA* specifically deems disclosure of personal information not an unreasonable invasion of personal privacy if “an enactment authorizes the disclosure.” I find s. 98(7) of the *Motor Vehicle Act* is an enactment *authorizing disclosure* thus deeming the disclosure of personal information to fall under the presumption that release of the s. 98(7) information would not constitute an unreasonable invasion of a third party’s personal privacy pursuant to s. 480(4)(c) of the *MGA*.

Therefore, in view of the *Re House* test, I find the inquiry leads to the conclusion that s. 480(4) of the *MGA* applies and that the disclosure of the specified information [names and addresses] would not be an unreasonable invasion of the third parties’ privacy because the release is authorized by an enactment. I find the Applicant has met his/her burden of proof and the third party information of witnesses, parties [including the deceased] and police officers should be released to the Applicant.

The second part of the analysis entails personal information of third parties who were working in their professional capacity with respect to the accident that is the subject of the Application for Access to a Record. “Employee” is defined in s. 464 of the *MGA* as follows:

“employee’ in relation to a municipality, includes a person retained under an employment contract to perform services for the municipality;

Section 480(4) of the *MGA* applies and deems the release of personal information about employees or those providing a public service for the Police Service is presumed not to be an unreasonable invasion of personal privacy. Section 480(4) provides as follows:

A disclosure of personal information is not an unreasonable invasion of a third party’s personal privacy if . . .

(e) The information is about the third party’s position, functions or remuneration as an officer, employee or member of a municipality;

I find the Police Service was inconsistent in its severing of professionals’ personal information including police officers: in many instances it released names of employees but severed the same named employee on other occasions. There was no consistent approach to disclosing and severing of personal names other than witnesses, which were withheld. I find that the Police Service should not have severed any of its employees, police officers or other professionals. I find in addition to the names being released under s. 98(7) of the *Motor Vehicle Act*, these names should be released as their names are included in the Record as part of their role as employees or agents doing a public service for the Police Service.

Some of the individuals may, however, have no contractual or employment relationship with the Police Service and, therefore, do not fall squarely within the definition of s. 461(b) of the *MGA*. For these third party professionals, in addition, therefore, this personal information can also be released as information relevant to a fair determination of the Applicant’s rights [see Finding 10].

ISSUE # 6 – BURDEN OF PROOF ON APPLICANT RE RELEASE OF THIRD PARTY INFORMATION

- 10) The remaining portion of the Record that was severed must now undergo the scrutiny of the remaining sections of the *Re House* decision.
 3. *Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 480(3)?*
 4. *In light of any s. 480(3) presumption, and in light of the burden upon the appellant established by s. 498(2) does the balancing of all relevant circumstances, including those listed in s. 480(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?*

The portions of the redacted Record that were not the reports sent pursuant to the *Motor Vehicle Act* do not fall under the presumption in s. 480(4) of the *MGA*.

The remaining severed sections are presumed to be an unreasonable invasion of privacy pursuant to s. 480(3), which provides in part as follows:

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

(b) was compiled, and is identifiable as, part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

The analysis continues. Where there is a finding that the disclosure would be an unreasonable invasion of privacy because a presumption applies, in this case because the Record was compiled as part of an investigation, the decision maker must go on to consider all other relevant factors.

In this case, I find there are two other factors to consider. The first is included in the list in s. 480(2) of the *MGA*, which provides a *non-exhaustive* list of relevant considerations. The pertinent one for this Review is as follows:

480(2) In determining whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the responsible officer shall consider all the relevant circumstances, including whether ...

(c) the personal information is relevant to a fair determination of the applicant's rights; ...

The Applicant bears the onus to demonstrate that the disclosure would not constitute an unreasonable invasion because the personal information is relevant to a fair determination of his/her rights. The Applicant made several Representations addressing this issue.

In the Investigation Summary, the Applicant was asked to address the four requirements necessary for s. 480(2)(c) of the *MGA* to apply in the circumstances. Those are as follows:

- 1. The right in question must be a legal right drawn from the common law or a statute, as opposed to a non-legal right based only on moral or ethical grounds;*
- 2. The right must be related to a proceeding which is either under way or is contemplated, not a proceeding that has already been completed;*
- 3. The personal information sought by the applicant must have some bearing on, or significance for, determination of the right in question; and*
- 4. The personal information must be necessary in order to prepare for the proceeding or to ensure a fair hearing.*

[ON Order P-651]

In response, the Applicant provided a copy of the Statement of Claim, which has been filed with the Supreme Court of Nova Scotia and addressed each of the four requirements in his/her Representations as follows:

- *All four circumstances are indeed present in the current case . . .*
- *There is an ongoing civil legal action which could result in a significant monetary judgement . . .*
- *The Plaintiffs in the civil action allege that [the Applicant's client]'s negligence caused the accident and [the deceased]'s death . . .*
- *There were several witnesses to the accident. In order to defend the claim against [the Applicant's client], it is necessary to speak with these witnesses to understand what happened that evening and to prepare [the Applicant's client]'s defence for trial. It will also be necessary for the Court to hear from these witnesses.*
- *I cannot locate and speak to these witnesses, who are crucial to [the Applicant's client]'s defence, because the Cape Breton Regional Police Service has blacked out their names and contact information.*

I find the Applicant has met his/her burden of proof to demonstrate that the disclosure of some of this personal information is relevant and required for a fair determination of his/her rights.

I have already dealt with the personal information of witnesses, parties [including the deceased] and police officers referred to in s. 98(7) of the *Motor Vehicle Act*. I find the disclosure of all of the personal information of this first category of third parties should be released pursuant to s. 480(2)(c) of the *MGA* because the information is relevant to a fair determination of the Applicant's rights. Under this finding, the personal information is not restricted to names and addresses.

I find there are three remaining categories of third parties' personal information. The remaining three categories of personal information can be described as relating to:

- a. Professionals working for other public bodies such as the Coroner and the hospital;
- b. The deceased; and
- c. Family, specifically the deceased and the Applicant's.

First I will consider the professionals other than the police officers, which have been discussed. It remains unclear on a reading of the complete Record what relationship exists between some of the professionals named and the municipality as the definition of "employee" does not take into account professionals working for other public bodies such as a hospital or the coroner. I find that the Police Service applied its decision to withhold personal information about other professionals inconsistently, sometimes disclosing and other times severing, with no explanation given for the discrepancy. A detailed list of these irregularities is available to the Police Service on request. I find it necessary, therefore, to make a finding that the personal information of these other professionals' names and

other personal information may be relevant to a fair determination of the Applicant's rights and should be released on that basis, as discussed above.

The second category involves the deceased. The name and address of the deceased is available pursuant to s. 98(7) of the *Motor Vehicle Act*. Section 480(3) of the *MGA* lists two situations where disclosure of personal information of a third party is presumed to be an unreasonable invasion of privacy. These include:

- (a) *relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;*
- (b) *was compiled, and is identifiable as, part of an investigation into a possible violation of law . . .*

Section 480(2)(c), as has been discussed, lists other relevant considerations in deciding if the presumption should be set aside. The onus is on the Applicant to demonstrate that other relevant considerations outweigh the presumption. I find that the Applicant has met his/her burden to demonstrate that the disclosure of the deceased's personal information including health-care and investigatory information is relevant and necessary for a fair determination of the Applicant's rights.

Lastly is the third category of third parties. The Record includes references to some family members of both the Applicant and the deceased. I find that the Police Service applied its decision to withhold personal information about family members of the Applicant and the deceased and his/her family members inconsistently, sometimes disclosing and other times severing, with no explanation given for the discrepancy. Again, a list of these irregularities is available to the Police Service on request. Regardless of what the Police Service have already released, I find that the personal information of all third parties who fall into the categories of either the Applicant's or the deceased's family contained in the Record should not have been and should not be disclosed. The disclosure of the personal information of these third party family members is presumed to be a breach of privacy. Because there is no evidence on which to base the presumption not being applied and because s. 480 of the *MGA* is a mandatory exemption, this information must be withheld.

ISSUE # 7 – FORCING APPLICANT TO SEEK ACCESS TO INFORMATION UNDER CIVIL PROCEDURE RULES

11. While not listed in s. 480(2) the *MGA*, another factor referred to by both the Applicant and the Police Service in their Representations is whether the Record being available through other avenues is relevant. Specifically through a Court application pursuant to Civil Procedure Rule 14.12 a person may gain access to information through a Court Order. Civil Rule 14.12 provides as follows:

A judge may order a person to deliver a copy of a relevant document or relevant electronic information to a party or at the trial or hearing of a proceeding.

Other jurisdictions have cited this as a possible factor when determining the weight to be given as a factor that favours disclosure. I have made it clear that other avenues to obtain information may be of interest but can never be cited as a justification to dilute the Applicant's right to access information under the *MGA* [See *FI-09-40*].

Given my finding that the release of the personal information is relevant to a fair determination of the Applicant's rights, I find that even if s/he is able to obtain it through the Courts, this factor is to be given little weight. Such proceedings may be a hollow remedy for some individuals who cannot afford to initiate proceedings in Court. In any event, though all applicants are free to pursue other avenues to obtain information, I find that this does not displace or dilute the Applicant's statutory right of access under the *MGA*.

I find the Police Service should not have refused this Applicant access to the Record on the basis that the information may also be available to him/her through the Courts.

RECOMMENDATIONS:

I make the following recommendations to the Police Service:

1. I recommend the Police Service release the personal information of third parties contained in the Record including:
 - a. Names and addresses for all witnesses and parties to the accident and police officers pursuant to s. 98(7) of the *Motor Vehicle Act*; and
 - b. Other personal information of all witnesses and parties to the accident [phone numbers] relevant to a fair determination of the Applicant's rights pursuant to s. 480(2)(c) of the *MGA*; and
 - c. The personal information of one party to the accident, the deceased, be released in full to the Applicant on the basis of two statutory provisions: name and address pursuant to s. 98(7) of the *Motor Vehicle Act* and all other personal information in the Record relevant to a fair determination of the Applicant's rights, including health-care history, pursuant to s. 480(2)(c) of the *MGA*.
2. I recommend the Police Service release all parts of the Record that contain personal information of other professionals named in the Record relevant to a fair determination of the Applicant's rights in accordance with s. 480(2)(c) of the *MGA*.
3. I recommend the Police Service disclose all personal information about the third parties in the Record working as an officer or employee of the Police Service from the entire Record in accordance with s. 98(7) of the *Motor Vehicle Act* and s. 480(4)(e) of the *MGA*.

4. I recommend that all personal information of the families of the Applicant and of the deceased should not have been released and should be withheld as this information is not referred to in s. 98(7) of the *Motor Vehicle Act*, as they were not witnesses or parties to the accident in this case, and is not relevant to a fair determination of the Applicant's rights under s. 480(2)(c) of the *MGA*.
5. The above recommendations apply to the entire responsive Record which includes those documents which were identified as missing from the disclosure made to the Applicant or that were identified during the formal Review. This will require the Police Service to justify its copy of the Record with the copy that was previously given to the Applicant.
6. I recommend the Police Service comply with the recommendations above and use the following information to do so:
 - a. In order to assist the Police Service, one page of the Record [page 104] in issue has been attached to the Police Service's copy of the Review Report to demonstrate how the information should be appropriately severed and provided to the Applicant. Any personal information in the Record that does not meet the test in s. 480(2)(c) of the *MGA* should be severed [highlighted on page 104]. This page of the Record will, of course, not be provided to the Applicant by the Review Officer nor will it be made public or posted to our website when the Review Report is made public.
 - b. In addition, the names of some of the individuals who fall into the categories referred to in the recommendations above [found on pages 84, 98 and 104] of the Record. For the sake of clarity, copies of these pages have been provided to the Police Service with its copy of the Review Report as its copy of the Record was unnumbered. These pages should be prepared for disclosure to the Applicant in a manner that is consistent with these recommendations. These pages of the Record will, of course, not be provided to the Applicant by the Review Officer nor will they be made public or posted to our website when the Review Report is made public.
7. The Police Service is to provide the Review Officer with a copy of its decision to the Applicant, including a complete copy of what information and parts of the Record are disclosed to the Applicant, in response to these recommendations, in accordance with s. 493 of the *MGA*.

Respectfully submitted,

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