# REPORT
## Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-09-40

**Report Release Date**: January 26, 2010

**Public Body**: Department of Justice

**Issue:** Whether the Department of Justice ["Justice"] has appropriately withheld the Record (DVDs) in full in accordance with the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether s. 20 of the *Act* requires Justice to withhold the DVDs in full or in part because disclosure of any personal information on the DVDs would be an unreasonable invasion of a third party's personal privacy.
2. Whether s. 15(1)(c) of the *Act* allows Justice to withhold the DVDs in full because release of the DVDs would harm the effectiveness of investigative techniques or procedures currently used in law enforcement.
3. Whether s. 15(1)(e) of the *Act* allows Justice to withhold the DVDs in full because release of the DVDs could reasonably be expected to endanger the life or physical safety of a law-enforcement officer or any other person.
4. Whether s. 15(1)(i) of the *Act* allows Justice to withhold the DVDs in full because the release of the DVDs would be detrimental to the proper custody, control or supervision of a person under lawful detention.

**Record at Issue:** Pursuant to s. 38 of the *Act*, Justice has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, which is all of the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the Freedom of Information and Protection of Privacy Review Officer or her delegated staff.

The Applicant was provided with a redacted copy of the paper portion of the responsive Record. The Form 7 Request

for Review did not raise any issues with respect to the severances made. The only portion of the responsive Record under Review is a series of DVDs that have been withheld in full. The Record consists of 11 disks [DVDs], each representing a specific date. There are a total of 23 separate segments on the DVDs of various length and quality, some with sound – audio and video – and some with only video. At Justice's request, the Record – the full set of the original DVDs – has been returned to Justice with this Review Report at the conclusion of the formal Review.

**Findings:**

The Review Officer made the following findings:

1. The original responsive Record included paper files as well as the DVDs. Justice released a redacted copy of the paper Record to the Applicant. The Applicant did not seek a Review of the severances applied to the paper files. The only Record at issue was the 11 DVDs.
2. Justice withheld all of the DVDs in what appears to be the application of a blanket exemption despite its claim it does not use blanket exemptions. Justice's lack of specificity with respect to which exemption was being applied to which portion of the Record [to each of the 43 segments] and failure to provide evidence or explanation to support the claim of harm under s. 15 demonstrates that it is probable that Justice applied blanket exemptions to the DVDs. In the last Review that has come before this Office involving videotapes in a correctional setting the Record had been withheld in full and Justice at that time stated that it never released videotapes.
3. The faces, bodies and voices [of employees of two public bodies and of other inmates that are captured in the video images and the audio track on DVDs] do fall within the definition of personal information.
4. The third parties on the DVDs are employees of Justice and health care workers. The latter provide medical services at the correctional facility under an arrangement between a district health authority and Justice. Those visible on the DVDs are working in their capacity as professionals working for a public body. While the workers' images are their personal information, an analysis under s. 20 concludes that the presumption that there is no invasion of personal privacy applies because the personal information is captured in the course of their work as employees of a public body.
5. At all material times on the DVDs, the employees are seen to be engaged in routine institutional enforcement procedures and not covert investigative techniques. The

one technique cited by Justice as potentially being compromised was the use of hand signals; two of which are apparent from my review of the DVDs but Justice has not specified the uniqueness or covertness of these techniques. Although I cannot reveal the content of the Record, similar information is widely available and publicly available through the internet.

6. The Applicant successfully argued that three of the relevant circumstances that a public body was required to consider under s. 20(2) were applicable: the disclosure is desirable to allow for public scrutiny of the activities of a public body, disclosure would promote the health of the Applicant and the personal information of the Applicant is relevant to a fair determination of his/her rights.
7. The Applicant relied on ss. 7 and 11(d) of the *Charter* to support his/her claim that release of the Applicant's personal information was relevant to a fair determination of his/her rights.
8. Justice failed to provide any evidence to demonstrate that s. 20(2)(e) – a third party would be exposed unfairly to harm if the information was disclosed – applied to the Record.
9. Because s. 15(1)(k) was not claimed by Justice either in its decision letter to the Applicant nor in its Representations as a late exemption, for example, any argument to withhold the Record based on harm to the security of the property or system has not been considered.
10. In order for Justice to rely on exemptions in s. 15 of the *Act* it must demonstrate that the release of the Record could reasonably be expected to harm, prejudice, reveal, endanger, deprive or be detrimental. Justice failed to provide an evidence to meet that test. The harm cannot be speculative. The public body must show evidence that links the release of the Record to the harm expected to occur.
11. It is clear from the Record that additional recordings were taken with a handheld video camera, which recordings have not been produced as part of the responsive Record placing search at issue.
12. The credibility of an administrative oversight body such as the Review Officer is based on its independence, impartiality and consistency. To that end, it is appropriate to rely on precedents that are relevant to any Review before the Review Officer.
13. Section 38 of the *Act* gives the Review Officer the power to request the production of all information deemed to be

relevant for examination during the course of the Review process.

**Recommendations:** The Review Officer recommended the following:

1. That Justice release the Record to the Applicant severing the images of third parties, such as any other inmates if any, but not any of the correctional or health care employees.
2. Alternatively, and as a minimum step, that Justice permit the Applicant, the Applicant's agent, a lawyer, and/or the Expert witness to view the DVDs onsite or at an agreed location as many times as needed to satisfy their needs.
3. That Justice search again for additional recordings taken with the handheld video camera, dates for which recordings are being provided to Justice under a separate cover.
4. If and when the additional videos are found, that Justice make an access decision to the Applicant consistent with recommendations 1 and 2, above.

**Key Words**: agent, audio, blanket exemption, camera, cell, confidential information, constitutional, correctional facility, disks, duty, DVD, employee, examination, Expert witness, fair trial, harm, health care workers, inmates, institutional, investigative techniques, mental health, on-site, privacy, power, precedents, prisoners, production, psychiatric, regulation, relevant, search, security, surveillance, technology, unreasonable invasion, video.

**Statutes Considered**: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 2; 3(1)(b); 3(1)(e); 3(1)(k); 3(1)(i); 4(3)(a); 5; 15(1)(c); 15(1)(e); 15(1)(i); 20(1); 20(2); 20(4); 38; 41; 42.*

**Case Authorities Cited**: *NS Review Reports FI-07-72; FI-07-59; FI-04-09(M); Ontario Order M-44; Re, House, [2000] N.S.J. No 473 (S.C.); Cuddy Chicks Ltd. V. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5; Ontario Order MO-2300; Canada (Information Commissioner) v. Canada (Prime Minister) (T.D.), [1993] 1 F.C. 427.*

**Other Cited:** *Canadian Charter of Rights and Freedoms, Constitution Act, Part 1, 1982, ss. 7 and 11(d); Nova Scotia Freedom of Information and Protection of Privacy Act Regulations, Forms 10 and 11.*

# REVIEW REPORT FI-09-40

## BACKGROUND

On February 4, 2009 the Applicant made an Application for Access to a Record to Correctional Services for the following Record:

> *a full and complete copy of [Applicant's] complete Institution Records from the date of [the Applicant's] remand in [date] to the date of [the Applicant's] release in [date].*

Along with the Application for Access to a Record letter, the Applicant provided a duly executed consent to release all information requested to his/her agent dated February 6, 2009. Throughout this Report, the Applicant's agent and the Applicant will be referred to as the Applicant.

Justice received the Application for Access to a Record from the Correctional Services office on February 17, 2009. On February 24, 2009 Justice advised the Applicant that it required an additional 30 days to respond due to the large volume of records that needed to be searched. Justice indicated it would respond by April 17, 2009 and advised the Applicant that s/he could complain to the Review Officer if s/he objected to the extension. No Request for a Review was received at the Review Office with respect to the additional time taken to process the Application for Access to a Record.

On April 8, 2009, Justice made a decision in response to the Application for Access to a Record as follows:

> *Access is being granted in part to these records. Information has been severed pursuant to 5(2) of the Act and DVDs withheld in full. Specifically, information has been removed under sections 15(1)(c)(d)(e)(i) and section 20(1) which relates to harming the effectiveness of investigative techniques or procedures currently used in law enforcement; the identity of confidential law enforcement source; physical safety of law-enforcement officers or other persons; proper custody, control or supervision of a person under lawful detention; and information the disclosure of which would constitute an unjustified invasion of the privacy of an individual (names and identifying information of other people). Copies of the severed records are included with this letter. As we discussed on February 25, 2009, I have removed duplicate copies of the document "Live Body Form" (with picture) which gets printed off for different dates.*

On May 19, 2009 the Review Office received a Request for a Review from the Applicant dated May 11, 2009, 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.*

On May 21, 2009, the Applicant confirmed with the Review Office that s/he had received a response from Justice in the form of paper files and was not seeking a Review of the decision with respect to the redacted paper Record. The Applicant also confirmed that the only part of the Record at issue in the Review was the responsive DVDs that had been withheld in full. On the same date, the Review Office shared this clarification of what was at issue in this Review with Justice.

On May 26, 2009, the Review Officer approved the Applicant's request for his/her Request for Review to be expedited. The approval was based on the sufficiency of the information provided by the Applicant as to the purpose for which the Record had been requested and the need for timeliness in relation to that purpose – criminal proceedings.

On June 4, 2009, the Review Office once again confirmed with the Applicant that the only Record at issue is the 11 DVDs.

On June 5, 2009, the Review Office provided Justice with several cases with similar facts for its consideration in an attempt to resolve the matter informally. A request was made for Justice to provide details as to how it exercised its discretion under s. 15 of the *Act*. On June 19, 2009, Justice responded to that request, details of which are included in the summary of its Representations below.

On July 24, 2009, Justice clarified that its s. 20(1) exemption claim was made with respect to third parties on the DVDs: other inmates and health care providers whose image is visible on the video.

During the course of the Investigation, the Review Office attempted to obtain documentation considered relevant to the investigation. The Review Office requested the information from a Department employee who referred the request to Justice's Freedom of Information and Protection of Privacy ["FOIPOP"] Administrator. At the same point in time the Review Office was requesting other documents from the FOIPOP Administrator, who asked the Review Office to explain the relevance of the requested materials. An explanation was provided out of courtesy.

Justice refused to provide some of the documentation requested by the Review Office but provided other documentation because it was already "publicly available."

The remaining exchanges in the course of the investigation are detailed in the Public Body's Representations below.

Although some responses to questions posed during the Investigation remained outstanding from Justice, on November 9, 2009, the Review Office provided the Applicant and Justice with a copy of the Investigation Summary. The parties were advised the Investigation portion of the Review was complete, and that Justice's responses would be addressed via a revision once received.

On December 1, 2009, the Review Office circulated the Revised Investigation Summary as a result of responses from the parties to the Investigation Summary. At that time, the Review Office also asked specific questions of Justice, which were to be included in its final Representations to the Review Officer for the formal Review.

On December 16, 2009, Justice advised the Review Office it did not want to add anything to the Representations previously provided. The Review Office had wanted Representations from Justice in regards to questions posed during the Investigation stage, which it had refused to provide other than information already publicly available.

On January 5 and 11, 2010, the Applicant provided his/her Representations for the formal Review.

On January 14, 2010, the Review Office requested additional clarification from the Applicant. On January 15, 2010, as the formal Review began, I asked the Applicant to verify information with respect to the timing and disclosure in the criminal proceedings.

Mediation was not attempted.

**RECORD AT ISSUE**

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

The Applicant was provided with a redacted copy of the paper portion of the responsive Record. The Form 7 Request for Review did not raise any issues with respect to the severances made. The only portion of the responsive Record under Review is a series of DVDs that have been withheld in full. The Record consists of 11 disks [DVDs], each representing a specific date. There are a total of 23 separate segments on the DVDs of various length and quality, some with sound – audio and video – and some with only video.

At Justice's request, the Record has been returned to Justice with the conclusion of this Review.

**APPLICANT'S REPRESENTATIONS**

On January 5, 2010, the Applicant provided a comprehensive final Representation to the Review Officer. The Review Officer is always conscious of disclosing information in a Review Report which could lead to the identification of an Applicant or the contents of the Record including details that would be considered sensitive. In this case, much of the information in the Applicant's Representations would normally not be included in the Review Report for that reason. The information basis for the Applicant's arguments for the disclosure of the Record, however, falls within this category.

Therefore, on January 18, 2010, the Review Officer pointed this out to the Applicant and asked for confirmation that the Applicant was content with including the basis of his/her arguments in the Representations. The Review Officer wanted to refer to the purpose behind the Application for Access to a Record though generally speaking the reason behind a request is not relevant. In this case, the reason the Record has been requested ties closely to the factors the Applicant had presented as favouring disclosure; therefore, the Review Officer wanted to be able to make reference to those factors in this Review Report. The Applicant understood what the Review Office was asking for and s/he gave permission to detail the Representations including the reason for the Application for Access to a Record, while making every effort to keep the identity of the Applicant confidential.

Details of the January 5, 2010 Representations are as follows:

1. The Applicant has requested these Records to provide them to an expert ["Expert witness"] who has been retained to complete a comprehensive report on behalf of the Applicant with respect to matters before the court and the requested information may be critical to the accuracy of the Expert witness's opinion and subsequently the Applicant's defence. The DVDs represent an unbiased recording of events that the Applicant was involved in while incarcerated.
2. With respect to s. 20(2), the factors that favour disclosure are:

    - Subsection (a): if the Applicant was housed in such a fashion that it adversely affected his/her psychiatric and/or psychological health and led to crimes being committed it would be desirable for the public to be made aware of these circumstances in order to prevent their repetition.
    - Subsection (b): similarly, if the Applicant was housed in such a fashion that it affected his/her psychiatric and/or psychological health and led to crimes being committed it would be desirable for the public to be made aware of these circumstances in order to prevent their repetition.
    - Subsection (c): disclosure of the DVDs may be of great relevance regarding the Applicant's right to a fair trial in accordance with ss.7 and 11(d) of the *Canadian Charter of Rights and Freedoms.*
    - None of the other factors are applicable.

3. The Applicant submits that none of the factors in s. 20(3) are applicable with the possible exception of (h) – racial or ethnic origin.
4. The Applicant reiterates that the types of information being considered are the faces and bodies of health care workers and other inmates, and poses the question: Is the release of a DVD that merely shows the face or body of an individual performing their regular employment functions an unreasonable invasion of privacy?
5. The factors that are applicable, in s. 20(4) are:

    - Subsection (b): The Applicant's health is at risk without a proper diagnosis.

- Subsection (e): The DVDs would merely depict third parties carrying out their functions as employees of the public body. Any individuals identified aside from the Applicant would be involved in their "professional capacity" or "business capacity". Any exposure would therefore not qualify as personal information. Nothing of a personal nature would be revealed.

6. Regarding Justice's claim of s. 20(2)(e) being applicable:

   - The term "will be exposed" means there is a level of certainty required; that the third party will be exposed unfairly to financial or other harm.
   - Re: financial harm – the information has been requested solely to assist in a comprehensive mental health evaluation of the Applicant.
   - The Applicant has seen no evidence to support a claim that other harm would result from release of the information. The Applicant was present at all material times. The incidents would already be known to the Applicant. The employees involved would already be known to the Applicant. The Applicant asks: How can the release of DVDs create harm?
   - Re: Absurd result – The Applicant was present when all the actions recorded by the DVDs occurred. They are the Applicant's own records. The information contained on the DVDs is already known to the Applicant. The Expert witness has requested the DVDs in order to observe the incidents by way of an objective recording. It would be absurd to deny DVDs that depict the Applicant.
   - Regarding the health care workers' faces and bodies:

     - They are engaged in their duties, as set out in the *Correctional Services Act*; *Correctional Services Regulations*; the *Correctional Services Code of Professional Conduct*; the *Corrections and Conditional Release Act* and the *Correctional and Release Regulations*.
     - These third party individuals would be performing a function of their job duties as an employee of a public body or as a member of the minister's staff, thereby disclosure would not be an unreasonable invasion of the third party's personal privacy.
     - Correctional Services employees and any Capital District Health Authority ["CDHA"] employees, at all material times relating to the making of the DVDs in question, would have been operating within their official capacity; the role played by these individuals on the DVDs would not reveal something of a "personal nature" about the individuals themselves.
     -

7. Regarding the claim of s. 15(1)(c) being applicable:

   - The Applicant has spent the majority of his/her adult life in correctional facilities.

- The Applicant is no stranger to correctional facilities. The policies and procedures used in the past and present are well known to the Applicant with or without the disclosure of the DVDs.
- The Applicant was present at all material times.
- The employees in question were likely well known to the Applicant and at all material times were engaged in regular institutional enforcement procedures rather than covert investigative techniques.
- Procedures used – the Applicant cites as an example a cell extraction involving the Applicant – would be the same from one day to the next. These procedures would be well known and commonplace to the institutional population.

8. Regarding the claim of s. 15(1)(e) being applicable:

    - There is no evidence of a reasonable expectation of harm to anyone regarding the release of the DVDs.
    - An unsupported claim, or mere speculation, alleged by Justice is not enough to deny disclosure.
    - The Applicant has been very clear with respect to his/her request for records and the reason for same – to assist in his/her own mental health treatment.

9. The Applicant has provided a response to the s. 15(1)(d) exemption which was not actually applied to the DVDs but was an exemption that was included in the initial decision to the Applicant, applying only to the paper records.
10. Regarding the claim of s. 15(1)(i) being applicable:

    - The Applicant is interested in any DVDs that depict his/her living conditions, his/her behaviour and his/her treatment at the hands of the guards and health care professionals while in segregation and/or solitary confinement.
    - The Applicant was present when all such recordings were created. The Applicant lived in the cells depicted.
    - The Applicant has already received DVDs depicting the Applicant's cell area on a specific date.

On January 11, 2010, the Applicant provided evidence that DVDs are able to be edited in such a way that it is possible to black out any features that might identify any third parties. The Applicant cited a precedent *"Out of Control"* shown on national TV on *The Fifth Estate* where images of a youth correctional facility were made public. The Applicant implies in his/her argument that the same kinds of images may be on the DVDs in the Record at issue and that there is technology that can be used to protect the images of any third parties, such as the health care workers and other inmates, therefore there would not be an unreasonable invasion of a third party's personal privacy.

On January 15, 2010, I asked the Applicant to verify information I had received regarding the fact that the Applicant had, during a recent appearance in court, received an undertaking on the part of Justice to provide edited copies of the DVDs for a later court

date, as part of the requirements of disclosure in a number of matters involving the Applicant before the courts. The Applicant is unaware of whether or not the DVDs s/he may receive as part of the court disclosure process are the same DVDs that are responsive to his/her Application for Access to a Record in this Review.

Justice did not contact the Review Office to indicate its decision with respect to the DVDs had changed. At the time of writing this Report, the Applicant has not received the DVDs.

**PUBLIC BODY'S REPRESENTATIONS**

On June 1, 2009 Justice provided the responsive Record to the Review Office and made the following Representation:

1. The s. 15 exemption was relied upon to withhold the responsive DVDs in full because the release of the Record would counteract security protocols; procedures (signals) used in law enforcement.
2. Release would also provide the physical layout of the facility which could potentially compromise security systems and thus be detrimental to the proper custody, control and supervision of offenders.
3. Offenders often fixate or threaten staff and have targeted staff in the community as a result of events within the correction facility.

On June 19, 2009, Justice provided the following information to the Review Office after being asked to give details of how it exercised its discretion to withhold the Record in full under s. 15 of the *Act.*

1. Justice voiced a concern that the Review Office's Case Review Analyst's attempt at an informal resolution by providing precedents amounted to pre-deciding the matter. Justice states such an attempt should be restricted to when the matter is in Mediation.
2. Justice stands by its decision and repeats the rationale included in its June 1, 2009 correspondence. [These are not repeated here – see June 1, 2009 Representation above.]
3. The identity of the staff can be discerned because they refer to each other by name or their faces are shown on the videos. Specific signals are used in the videos when getting an offender under control.
4. Security areas and systems are shown that could compromise security. [Note Justice did not claim s. 15(1)(k) exemption.]
5. The following were cited as relevant factors [without further expansion] Justice considered in exercising its jurisdiction:

    a. Purpose of the *Act.*
    b. Nature of the Record and significance or sensitivity to a public body.
    c. Whether disclosure would increase public confidence.
    d. Whether the individual's request was being satisfied by supplying as much information as practicable [bundle of paper records disclosed].
    e. Harm that might reasonably be expected from the disclosure.

On July 24, 2009, Justice clarified the issue with respect to its s. 20 exemption claim. Justice advised that s. 20(1) was claimed with respect to third parties on the DVDs: other inmates and health care providers whose image is visible on the video.

On September 28, 2009, Justice refused to provide some further documentation requested by the Review Office and provided some documents that it had previously refused but were forwarded now because the documents were already "publicly available". That Representation from Justice, which focused on the issue of responding to the request for documents deemed relevant to the Investigation from the Review Office, provided as follows:

1. "The issue of the appeal is the DVDs and these DVDs were provided on June 1, 2009."
2. "Section 38(1) relates to access to the records at issue. The documents you have requested are not at issue in this Review. Past practice and other jurisdictions (Ontario and BC) support this interpretation."
3. "I believe we are all working to achieve the same end result, ensuring the Act is applied appropriately and fairly. As such I am very conscientious in assisting applicants and in creating a good working relationship with the Review Office."
4. "To this end, I am enclosing copies of the position description and job posting you requested, which are publicly available."

On October 22, 2009, the Review Office posed a number of follow-up questions to Justice by email. Justice's responses were provided on October 30, 2009 as follows:

1. "I cannot confirm which segments in the DVDs contain the images of third parties (CDHA employees or other offenders)."
2. "The section 20 exemption applied to the DVDs encompasses any personnel external to Justice and any other individuals (offenders) which were seen within the DVDs."
3. "The Application of the section 20 exemption is based on the fact that it is an unreasonable invasion of privacy to show the faces of external employees and/or other offenders who happen to be caught on camera."
4. "Faces, like names, are considered identifiable personal information under the FOIPOP Act."
5. "Section 20 does not give an exhaustive list but section 2(e) [s. 20(2)(e)] relates to exposure to harm."
6. "Specific to this situation the applicant is a dangerous offender who has threatened and is a threat to both staff and other individuals."
7. "…there are other instances in which offenders can be seen (i.e. behind doors)."
8. "I do not have segment numbers for when the CDHA employees are seen in the DVDs."

On November 9, 2009, the Review Office provided the Applicant and Justice with a copy of the Investigation Summary and advised that although Justice's response to certain questions was still outstanding, the file could not be delayed any long and would be forwarded to the Review Officer for formal review.

On November 13, 2009, Justice responded to the Investigation Summary and restated answers to questions that were originally asked of Justice on October 22, 2009:

1. Justice processes access requests on a case by case basis and does not apply blanket exemptions.
2. Some of the DVDs include images of employees CDHA, a health agency.
3. Section 15(1)(e) also being claimed as applicable to the CDHA employees. [Note this is the first time Justice has indicated that this subsection applied to the third parties.]
4. Justice states that although the information that accompanied the Investigation Summary is research that may be helpful background material, it is neither precedent nor caselaw.

On December 16, 2009, Justice advised the Review Office it did not want to add anything to the Representations previously provided.

**ISSUES**

The issues in this Review are as follows:

1. Whether s. 20 of the *Act* requires Justice to withhold the DVDs in full or in part because disclosure of any personal information on the DVDs would be an unreasonable invasion of a third party's personal privacy.
2. Whether s. 15(1)(c) of the *Act* allows Justice to withhold the videos in full because release of the videos would harm the effectiveness of investigative techniques or procedures currently used in law enforcement.
3. Whether s. 15(1)(e) of the *Act* allows Justice to withhold the videos in full because release of the videos could reasonably be expected to endanger the life or physical safety of a law-enforcement officer or any other person.
4. Whether s. 15(1)(i) of the *Act* allows Justice to withhold the videos in full because the release of the videos would be detrimental to the proper custody, control or supervision of a person under lawful detention.

**DISCUSSION**

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

> *2 The purpose of this Act is*
>
> > *(a) to ensure that public bodies are fully accountable to the public by*
> >
> > > *(i) giving the public a right of access to records,*
> > > ***(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,***
> > > ***(iii) specifying limited exceptions to the rights of access,***
> > > *(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies public bodies, and*

***(v) providing for an independent review of decisions made pursuant to this Act;***
***[Emphasis added]***

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 5 of the *Act*, once a request has been received.

*5 (1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.*

*(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.*

The responsive Record at issue is made up of 11 DVDs, which fall within the definition of record in s. 3(1)(k) of the *Act*, which definition reads as follows:

*"record" includes . . . papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records*

Justice relies on two exemptions in its decision. One is s. 20 – personal information – which is mandatory and the second is s. 15 – law enforcement – that is a discretionary exemption.

**SECTION 20 – PERSONAL INFORMATION EXEMPTION**

The first exemption to be considered is s. 20, a mandatory exemption – which means that if the exemption applies, the public body must withhold the information from an applicant. Although the Review Office does not reveal the contents of the Record at any time, it can categorize the types of information that were severed. This is important as once Justice has demonstrated that the exemption may apply, the onus shifts to the Applicant and s/he needs to be able to know what types of information have been severed to make his/her arguments. According to Justice the third party personal information that is contained in the DVDs falls within the following categories:

- Faces of health care workers
- Faces of other inmates
- Bodies of health care workers
- Bodies of other inmates

Justice claimed s. 20(1) of the *Act* in relation to the personal information [the images of some of the health care workers and other inmates on the DVDs], which it argues if released would constitute an unjustified invasion of third parties' privacy who are employees of another public body. Section 20(1) reads as follows:

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

Justice did specify its reliance on s. 20(1) in its initial decision to the Applicant but not the applicability of this provision to the health care workers specifically. Once that was clarified with Justice, it made it clear that it considered the images of the health care workers to fall within the definition of personal information the release of which would be an unreasonable invasion of a third party's privacy.

Personal information is defined in the *Act* as follows:

*3(1)(i) "personal information" means recorded information about an identifiable individual, including*

*(i) the individual's name, address or telephone number,*
*(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
*(iii) the individual's age, sex, sexual orientation, marital status or family status,*
*(iv) an identifying number, symbol or other particular assigned to the individual,*
*(v) the individual's fingerprints, blood type or inheritable characteristics,*
*(vi) information about the individual's health-care history, including a physical or mental disability,*
*(vii) information about the individual's educational, financial, criminal or employment history,*
*(viii) anyone else's opinions about the individual, and*
*(ix) the individual's personal views or opinions, except if they are about someone else;*

The images of the health care workers and inmates fall within the meaning of recorded information about identifiable individuals. The Applicant in his/her Representations notes that it is the identity of him/her on the DVDs that is of interest to the expert witness and not the identities of third parties.

Justice is under a duty to consider all relevant circumstances in determining if disclosure of personal information fits the test within s. 20(1), which circumstances are to include:

*20(2)In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether*

*(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;*

*(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;*
*(c) the personal information is relevant to a fair determination of the applicant's rights;*
*(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;*
*(e) the third party will be exposed unfairly to financial or other harm;*
*(f) the personal information has been supplied in confidence;*
*(g) the personal information is likely to be inaccurate or unreliable; and*
*(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.*

The three circumstances cited by the Applicant as favouring disclosure under s. 20(2) of the *Act* can be summarized as follows:

1. Subsection (a): if the DVDs show that the Applicant was housed in such a fashion that it adversely affected his/her psychiatric and/or psychological health and led to crimes being committed it would be desirable for that to be subject to public scrutiny.
2. Subsection (b): if the DVDs show that the Applicant was housed in such a fashion that it adversely affected his/her psychiatric and/or psychological health and led to crimes being committed, it would be desirable for the public to be made aware of these circumstances in order to prevent their repetition.
3. Subsection (c): Disclosure of the DVDs may be of great relevance regarding the Applicant's right to a fair trial in accordance with ss. 7 and 11(d) of the *Canadian Charter of Rights and Freedoms.*

Justice identifies only one circumstance under s. 20(2)(e) that supports its decision not to disclose:

> Section 20 does not give an exhaustive list but subsection 2(e) relates to exposure to harm.

Section 20 lists both when there is a presumption it will be an unreasonable invasion of privacy and when it will be presumed not to be an unreasonable invasion of privacy. None of these provisions were cited by Justice and so it remains unclear how releasing a DVD that may show the face of a health care worker, who is on the DVD in the course of their employment with a public body, does not fit within s. 20(4), which provides:

> *20(4) **A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if***
>
> *(a) the third party has, in writing, consented to or requested the disclosure;*
> *(b) there are compelling circumstances affecting anyone's health or safety;*
> *(c) an enactment authorizes the disclosure;*
> *(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;*

***(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;***
*(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;*
*(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;*
*(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or*
*(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).*
***[Emphasis added]***

The analysis procedure under s. 20 is well-established. First the public body must establish that it is personal information. Justice has done that. Then it must work its way through s. 20 as indicated in the Supreme Court of Nova Scotia case, *Re House* Moir J. discussed the process to be followed in assessing whether personal information should be released. He stated:

*. . . I propose to consider this appeal in the following way:*

*1. Is the requested information "personal information" within s. 3(1)(i)? If not, that is the end. Otherwise, I must go on.*
*2. Are any of the conditions of s. 20(4) satisfied? If so, that is the end.*

*Otherwise . . .*

*3. Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?*
*4. In light of any s. 20(3) presumption, and in light of the burden upon the appellant established by s. 45(2), does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?*
*[Re, House, [2000] N.S.J. No 473]*

The health care workers are employed by a regional health authority that is a public body for the purpose of the *Act.* Employee is defined in the *Act* is defined as follows:

*3(1)(b) "employee", in relation to a public body, includes a person retained under an employment contract to perform services for the public body;*

Justice has an agreement with the regional health authority to provide services in the correctional facility. The facts relevant to the health care workers are as follows:

1. The health care workers are employees of a District Health Authority.
2. The District Health Authority is a public body.
3. The District Health Authority is subject to the *Act.*
4. The District Health Authority, effective October 2001, is mandated to provide primary health care services to Nova Scotia's corrections population. This is in collaboration with the Department of Justice.

The *Act* does not restrict the definition of "employee" to those working for the Department with responsibility for a record; rather, "employee" relates to those working for a public body. Therefore, like the correctional workers, the health care workers are employees of a public body and are not third parties whose personal privacy is protected in the course of their employment.

The onus is on the public body to demonstrate that the information is personal information about a third party and its release would result in an unreasonable invasion of privacy. Only after that is demonstrated does the onus shift to the Applicant under s. 45(2) to rebut this presumption. In this case, using the analysis in the Nova Scotia Supreme Court, it is unnecessary to consider s. 20(3) as one of the conditions as s. 20(4) has been satisfied. The images of the health care workers fall within the meaning of information about a person working as an employee in a professional capacity for a public body and are presumed not to be unreasonable invasions of privacy.

In the case of images of the inmates, these too fall within the definition of personal information. Justice's Representations address the issue and the Applicant's Representations did not address the question of the inmates and therefore I am making a finding that these images should be severed. It should be noted however, that Justice has never confirmed that the DVDs do in fact contain the images of inmates. Given the purpose for which the Applicant is seeking this Record – for analysis by the Expert witness as to the mental health of the Applicant – the Applicant is likely not interested in the images of these third parties. On viewing the Record, I found only one example of the face of a possible inmate that was not discernable.

Justice stated that it does not apply blanket exemptions. The problem with accepting that claim is that there were no reasons or explanation under the exemptions claimed that distinguish how it applied the exemption in this case to each of the 11 DVDs. Questions were posed to Justice to obtain details as to which exemption subsection was being applied to which segment of each of the DVDs. A response was not forthcoming and therefore I am left with DVDs containing personal information of the Applicant, some employees of two public bodies and maybe another inmate that were withheld in total. This situation is reminiscent of a previous Review Report.

In *FI-06-79* I was advised by Justice that it always refuses the release of videotapes. In that case, I recommended that Justice reconsider its decision based on the Review Report, exercise its discretion and provide reasons with a view to releasing all or part of the videos. That Recommendation was not followed. That case is almost identical to the present Review. Without a full explanation and based on the similarity, I

find that Justice is not demonstrating how it applies each of the exemptions to each part of the Record; therefore it is applying the exemption in a blanket format.

As I understand the history with respect to this matter, the Applicant is involved in criminal proceedings in which s/he was unable to get the DVDs through the customary court disclosure process because the Record was with Justice. That resulted in the Applicant making the Application for Access to a Record under the *Act*. During the course of the criminal process just as this matter was being moved to formal Review at the Review Office, the Applicant advised that s/he was being provided with a copy of the DVDs via the court process.

It is trite to state that the Applicant is entitled to obtain information through any legal avenue available and the fact that s/he would obtain the DVDs through routine criminal disclosure does not preclude him/her from making an Application for Access to a Record. S/he is entitled to seek information through more than one avenue. The Applicant has a right of access under the *Act*, at s. 4(3)(a), in addition to any other remedies lawfully available:

> *This Act does not limit the information otherwise available by law to a party to litigation including a civil, criminal or administrative proceeding.*

**CHARTER OF RIGHTS AND FREEDOMS**

The Applicant raised ss. 7 and 11(d) of the *Charter of Rights and Freedoms* ["*Charter*"]. Those constitutional provisions read as follows:

> *7. Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.*
>
> . . .
>
> *11. Any person charged with an offence has the right . . .*
>
> > *(d) to be presumed innocent until proven guilty according to law in a fair and public hearing by an independent and impartial tribunal;*

The Applicant argued that the disclosure of the DVDs would be highly relevant to preserving the Applicant's constitutional right to a fair trial guaranteed by these sections of the *Charter.* The Applicant has not made a constitutional challenge of the *Act.*

The Supreme Court of Canada made it clear in a number of decisions that it is appropriate for an administrative tribunal to consider *Charter* issues. That principle was articulated as follows:

> *The power of an administrative tribunal to consider Charter issues was addressed recently by this Court in Douglas/Kwantlen Faculty Assn. v. Douglas College, [1990] 3 S.C.R. 570. That case concerned the jurisdiction of an arbitration board,*

*appointed by the parties under a collective agreement in conjunction with the British Columbia Labour Code, to determine the constitutionality of a mandatory retirement provision in the collective agreement. In ruling that the arbitrator did have such jurisdiction, this Court articulated the basic principle that an administrative tribunal which has been conferred the power to interpret law holds a concomitant power to determine whether that law is constitutionally valid. [Cuddy Chicks Ltd. V. Ontario (Labour Relations Board), [1991] 2 S.C.R. 5]*

I agree with the Applicant. While the rules in the criminal process itself both through pre-trial disclosure and during the course of the proceedings will give the Applicant's constitutional rights their due attention, they are a valid consideration for the Review Officer. In this case, the Record is sought to enable an Expert witness, a mental health professional, to prepare an opinion for the Applicant. In this case, I find that the Applicant's constitutional right to a fair trial is a valid consideration as to whether or not the Record should be released, in order to permit him/her to prepare for trial.

**SECTION 15 EXEMPTION – HARM, ENDANGER OR BE DETRIMENTAL**

*15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to . . .*

*(c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement; . . .*
*(e) endanger the life or physical safety of a law-enforcement officer or any other person; . . .*
*(i) be detrimental to the proper custody, control or supervision of a person under lawful detention;*

Law enforcement is defined in the *Act* as follows:

*3(1)(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;*

The first exemption Justice relied on under s. 15 of the *Act* is where a public body can demonstrate that release could reasonably be expected to harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement.

*Regarding whether or not the release of all or part of the responsive Record would harm law enforcement or investigative techniques currently in use, there is nothing in the Record itself that points to anything that is unique to child welfare investigations or their associated techniques. Section 15 is a discretionary exemption that requires the public body to provide the Review Office with*

*evidence as to how it exercised its discretion to refuse the Record because the law enforcement exemption applies. That evidence must demonstrate that disclosure could reasonably be expected to harm law enforcement, harm the effectiveness of investigative techniques or reveal the identity of a confidential source. The Society failed to provide any evidence to support its reliance on this exemption.*

*In a recent Review Report, I found that Community Services could not refuse access to all of the Department's Child Protection Services Policy Manual wherein I stated:*

> *As Community Services did not provide any evidence that the disclosure of the information to the Applicant could reasonably be expected to harm the effectiveness of techniques other than theoretically and some of the severed material is already in the public domain, the exemption in s. 15(1)(c) is not applicable to this Record;*
>
> . . . in order to meet the statutory test of "could reasonably be expected to harm" and thus make out the exemption applies, the public body must be able to show probable harm.

*[NS Report FI-07-72]*

The second exemption Justice relied on under s. 15 is where a public body can demonstrate that the release could reasonably be expected to endanger the life or physical safety of a law-enforcement officer or any other person.

*Generally, the law enforcement exemption must be approached in a sensitive manner, recognizing the difficulty of predicting future events in a law enforcement context [Ontario (Attorney General) v. Fineberg, (1994), 19 O.R. (3d) 197 (Div. Ct.)].*

*Except in the case of section 14(1)(e), where section 14 uses the words "could reasonably be expected to", the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [Order PO-2037, upheld on judicial review in Ontario (Attorney General) v. Ontario (Information and Privacy Commissioner), [2003] O.J. No. 2182 (Div. Ct.), Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner, (1998), 41 O.R. (3d) 464 (C.A.)].*

*In the case of section 14(1)(e), the institution must provide evidence to establish a reasonable basis for believing that endangerment will result from disclosure. In other words, the institution must demonstrate that the reasons for resisting disclosure are not frivolous or exaggerated. However, while the expectation of harm must be reasonable, it need not be probable [Ontario (Information and Privacy Commissioner, Inquiry Officer) v. Ontario (Minister of Labour, Office of the Worker Advisor), (1999), 46 O.R. (3d) 395 (C.A.)].*
*[NS Review Report FI-07-59]*

The third exemption Justice relied on under s. 15 is where a public body can demonstrate that release could reasonably be expected to be detrimental to the proper custody, control or supervision of a person under lawful detention. This subsection has not yet been the subject of a Review Report in Nova Scotia. For the purpose of this Review, it is helpful to consider jurisdictions with a similar provision that may be instructive, although the wording in this section is unique to Nova Scotia. In most other jurisdictions including Prince Edward Island, Ontario, Manitoba, Saskatchewan, Alberta and British Columbia, the equivalent wording is "facilitate the escape from custody" rather than "be detrimental to the proper custody":

> *Even if there are some features in the records that reflect the Don Jail as actually built, I find that I have not been provided with the requisite "detailed and convincing" evidence to establish that disclosure of the records could reasonably be expected to endanger or jeopardize the security of the Toronto Jail building or facilitate the escape from custody of a person who is under lawful detention in the Toronto Jail.*
>
> *The records are hand sketched drawings of a proposed jail and are not significantly detailed. They do not "set out construction plans, including drawings, for new windows in the facility, existing and proposed types of materials to be used in construction, such as various types of locks and bars, a listing of construction work to be done in the order in which it should be done, a general description of the facility's grounds and surrounding area etc." as was the case in the fact situation that gave rise to Order 187.*
>
> *Although the Don Jail and Toronto Jail abut each other, the proximity of these two buildings alone is not sufficient to bring the records within the claimed exemptions. As pointed out by the appellant, other public buildings abut lawful detention centres. Similar information to that set out in the records is publicly available through the internet, in books and on the walls of the Toronto Archives. Furthermore, details concerning the interior of the Don Jail as actually built are, and have been in the past, made publicly available. In particular, the interior and exterior of the Don Jail is detailed in the Ontario Realty Corporation video and has also been included in films.*
> *[ON Order MO-2300]*

The test under s. 15 of the *Act* is whether ***disclosure could reasonably be expected to*** harm, endanger or be detrimental. The onus is on the public body to meet the test in s. 15 and provide reasons as to how it exercised its discretion.

During the course of its Representations, Justice made arguments about withholding the information because it could harm a security system by providing the layout of the property, but at no time did Justice include s. 15(1)(k) in any correspondence to the Applicant or the Review Officer, therefore it will not be considered as part of this Review. In its final Representation on November 13, 2009, Justice claimed that s. 15(1)(e) was applicable to withholding the images of the health care workers on the DVDs in addition to the images of the correction service workers.

Initially it was not clear that the s. 15(1)(e) exemption was being claimed by Justice as being applicable to the health care workers. When Justice clarified this on November 13, 2009, it did not provide any additional information as to how it exercised its discretion under the s. 15 exemption in relation to these health care workers' images. In order for this exemption to apply to the health care workers, the onus is on Justice to demonstrate that releasing the Record would endanger the life or physical safety of any person. The subsection is very specific in its wording ***the third party <u>will be</u> exposed to financial or other harm.***

The test under s. 15 focuses on a demonstration of harm. The question must be asked: what is the connection between the release of the Record and any third party being exposed to harm? In other words, how could the release of the DVDs to the Applicant, who has spent a great deal of time in the correctional facility and knows all of the third party employees, expose those employees to any further harm than that resulting from their jobs themselves? Justice provided no evidence to meet the s. 15(1)(e) test.

In a prior Review Report, the Review Officer found that there had to be more than mere speculation about the possibility of harm:

> *In my Review FI-01-134, I address the "proof of harm" issue. The Federal Court of Appeal has ruled that while proof of harm does not require "detailed and convincing evidence" there needs to be evidence "of a reasonable expectation of <u>probable</u> harm" (underline added) [Canada Packers Inc. v. Canada (Minister of Agriculture)(1998), 53 D.L.R. (4th) 246].*
>
> *The same Court, in Rubin v. Canada (Minister of Transport) 1997), 221, N.R. 145 (Fed. C.A.), said "(w)here the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard (of proof) is not met."*
>
> *In a ruling of the Nova Scotia Court of Appeal, Justice Bateman concluded "that the legislators, in requiring "a reasonable expectation of harm," must have intended that there be more than a possibility of harm to warrant refusal to disclose a record." [Unama'ki v. Chesal 2003 NSCA 124 (CanLII), (2003) NSCA 124].*
> *[FI-04-09(M)]*

Most Commissioners throughout Canada rely on a case from the Federal Court that set the standard [*Refer also to NS Review Reports FI-07-58 and FI-07-72*], which held:

> *Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information.*

*...the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue. [Canada (Information Commissioner) v. Canada (Prime Minister) (T.D.), [1993] 1 F.C. 427]*

The Applicant argues that none of the exemptions under s. 15 apply in this case. The DVDs are largely of the Applicant and it is his/her personal information. The Applicant is not a stranger in the setting in which the video and audio is captured on the DVDs. All of the employees of public bodies are already well known to him/her. The facility and staff are well known to the Applicant and s/he will learn nothing knew that will harm procedures or endanger safety of anyone or be detrimental to the control or supervision of a person in lawful detention. To refuse the Applicant his/her personal information in this context would be contrary to the purpose of the *Act* and lead to an absurd result:

*However, it is an established principle of statutory interpretation that an absurd result, or one which contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose. [ON Order M-444]*

The Applicant wants the information so it can be provided directly to the Expert witness who is being called upon to evaluate the conditions while incarcerated and the extent to which this could have impacted the Applicant. The Expert witness is being called upon in the criminal proceedings involving the Applicant, which arise out of infractions while in the institution. The Expert witness has advised the Applicant of the items s/he requires to prepare his/her opinion for the court and one of those items is any audio or video tapes of the Applicant while in correctional institutional settings, some of which are the subject of the Applicant's Application for Access to a Record.

**SEARCH**

On reviewing all of the Record when this matter came to formal Review, I found at least two instances of the Record itself revealing the use of a handheld video camera, the DVD video/audio of which has not been produced and one instance where a recording from a stationery camera may be missing. This leads me to find that search may be an issue. Details of the date when these recordings were made have been provided to Justice to assist them in identifying that part of the responsive Record.

**VALUE OF PRECEDENTS**

During the Review process, the Review Office shared precedents from the Nova Scotia Review Officer, courts and other jurisdictions who have the same or similar legislation. Justice resisted the value of this information despite its own reliance on precedents to support its own positions. In response to that opposition, the following explanation from the Review Office was provided to the Applicant and Justice:

> *The FOIPOP Review Officer is a quasi-judicial administrative body responsible for reviewing decisions made by public bodies. As with all administrative bodies in the public law realm, one important aspect is credibility with the public. Members of the public and those working within government need to understand how the statute will be interpreted. This allows for greater expertise within government and greater understanding in the minds of the public. This is also consistent with the rule of law. Prior NS Review Officer findings and recommendations are not binding in the same way as they might be in a court of law. That being said, the credibility of an administrative tribunal is largely dependent on its independence, impartiality, and consistency. That is why such administrative bodies were established in the first place. Each case will be dealt with differently but as a matter of general application, the Review Officer will treat NS caselaw from the courts as binding precedent, will consider similar cases within Nova Scotia as compelling precedent while decisions from other jurisdictions will depend on whether it is dealing with a similar statute and whether it is a decision from a Court or a Commissioner. The latter will most often be considered decisions of interest or persuasive precedent. To do otherwise - to ignore like cases and earlier findings/rulings would give the impression that the Review Officer has fettered her discretion and makes decisions based on something irrelevant resulting in . . . her findings and recommendations coming across as arbitrary and capricious.*

Why is it important that the Review Officer canvass precedents from the Courts of Nova Scotia, and other Commissioners from Atlantic Canada and other jurisdictions across Canada with the same or similar legislation?

The powers of the Freedom of Information and Protection of Privacy Review Officer are granted to her by the enabling statute. The mandate of the Review Officer is defined in the purpose section of the *Act* where it states:

> *2(a) providing for an independent review of decisions made pursuant to this Act*

Superior Courts have an inherent power at common law to review any decision of an administrative decision maker. The power of judicial review is found either in the enabling statute or by virtue of the common law. In the case of the Review Officer, the statute provides for an appeal to the Nova Scotia Supreme Court under ss. 41 and 42. The Review Officer is under a duty not to be a party to these proceedings. That means that the only way in which the Review Officer can demonstrate how she reviewed the decision of a public body is in her Review Reports, which are all made public.

When the Nova Scotia Supreme Court exercises its authority under s. 42 of the *Act* the Judge will look for precedents that will assist the Court to make a determination. It is clear on a reading of Forms 10 and 11 under the *Regulations* under the *Act* that appellates, both applicants and third parties, are required to append the Review Officer's recommendations and reasons. That means, by *Regulation,* all matters that have gone to the Supreme Court after the Review Officer has concluded her Review, have as a requirement to file the Review Report with the Court. While the Court is free to come to a different conclusion than the Review Officer and may consider the matter *de novo,* the Review Officer's Report will be before it to enable the Court to know the Review Officer's reasoning.

That is why precedents are important because that is how the common law has unfolded since its beginnings to build a body of jurisprudence upon which we can all rely. It is incumbent on the Review Officer, therefore, to follow suit so the reviewing court can have the benefit of the analysis she relied on in making her findings and recommendations under the *Act.* Precedents are important foundational pieces that enhance a standard of correctness and surety within the administrative law context.

**PRODUCTION AND EXAMINATION OF RECORDS HELD BY PUBLIC BODIES**

There appears to be lack of clarity around what the Review Office can and cannot access during the course of a Review. Justice questioned and in some cases refused to provide information and documentation requested several times during the investigation that was considered relevant to the Review. In this regard, s. 38 of the *Act* outlines the duties and powers of the Review Officer, as follows:

> *38 (1) Notwithstanding any other Act or any privilege that is available at law, the Review Officer may, in a review,*
>
> > *(a) require to be produced and examine any record that is in the custody or under the control of the public body named in the request made pursuant to subsection (1) of Section 6; and*
> > *(b) enter and inspect any premises occupied by the public body.*
>
> *(2) A public body shall comply with a requirement imposed by the Review Officer pursuant to clause (a) of subsection (1) within such time as is prescribed by the regulations.*
>
> *(3) Where a public body does not comply with a requirement imposed by the Review Officer pursuant to clause (a) of subsection (1) within the time limited for so doing by subsection (2), a judge of the Supreme Court of Nova Scotia may, on the application of the Review Officer, order the public body to do so.*

This section is interpreted to provide the Review Officer with the power to review any document that is deemed relevant to a Review investigation. Other jurisdictions have the same power and it has been interpreted to mean the oversight body has unfettered access to all relevant materials and individuals during an investigation. Courts are likely

to give this section broad and liberal interpretation and would not read it down in the manner suggested by Justice throughout this Review. At one point, Justice refused to provide the job descriptions of correctional workers, which were requested to ascertain the extent to which their job description contemplated situations such as those captured on the audio and video on the DVDs. Subsequently Justice provided the job descriptions indicating they were being produced because they were already publicly available. Such an approach seems unnecessarily obstructive and not consistent with the meaning of s. 38 of the *Act.*

**FINDINGS:**

1. The original responsive Record included paper files as well as the DVDs. Justice released a redacted copy of the paper Record to the Applicant. The Applicant did not seek a Review of the severances applied to the paper files. The only Record at issue was the 11 DVDs.
2. Justice withheld all of the DVDs in what appears to be the application of a blanket exemption despite its claim it does not use blanket exemptions. Justice's lack of specificity with respect to which exemption was being applied to which portion of the Record [to each of the 43 segments] and failure to provide evidence or explanation to support the claim of harm under s. 15 demonstrates that it is probable that Justice applied blanket exemptions to the DVDs. In the last Review that has come before this Office involving videotapes in a correctional setting the Record had been withheld in full and Justice at that time stated that it never released videotapes.
3. The faces, bodies and voices [of employees of two public bodies and of other inmates that are captured in the video images and the audio track on DVDs] do fall within the definition of personal information.
4. The third parties on the DVDs are employees of Justice and health care workers. The latter provide medical services at the correctional facility under an arrangement between a district health authority and Justice. Those visible on the DVDs are working in their capacity as professionals working for a public body. While the workers' images are personal information, an analysis under s. 20 concludes that the presumption that no invasion of personal privacy applies because the personal information is captured in the course of their work as employees of a public body.
5. At all material times on the DVDs, the employees are seen to be engaged in routine institutional enforcement procedures and not covert investigative techniques. The one technique cited by Justice as potentially being compromised was the use of hand signals; two of which are apparent from my review of the DVDs but Justice has not specified the uniqueness or coverttness of these techniques. Although I cannot reveal the content of the Record, similar information is widely available and publicly available through the internet.
6. The Applicant successfully argued that three of the relevant circumstances that a public body was required to consider under s. 20(2) were applicable: the disclosure is desirable to allow for public scrutiny of the activities of a public body, disclosure would promote the health of the Applicant and the personal information of the Applicant is relevant to a fair determination of his/her rights.

7. The Applicant relied on ss. 7 and 11(d) of the *Charter* to support his/her claim that release of the Applicant's personal information was relevant to a fair determination of his/her rights.
8. Justice failed to provide any evidence to demonstrate that s. 20(2)(e) – a third party would be exposed unfairly to harm if the information was disclosed – applied to the Record.
9. Because s. 15(1)(k) was not claimed by Justice either in its decision letter to the Applicant nor in its Representations as a late exemption, for example, any argument to withhold the Record based on harm to the security of the property or system has not been considered.
10. In order for Justice to rely on exemptions in s. 15 of the *Act* it must demonstrate that the release of the Record could reasonably be expected to harm, prejudice, reveal, endanger, deprive or be detrimental. Justice failed to provide any evidence to meet that test. The harm cannot be speculative. The public body must show evidence that links the release of the Record to the harm expected to occur.
11. It is clear from the Record that additional recordings were taken with a handheld video camera, which recordings have not been produced as part of the responsive Record placing search at issue.
12. The credibility of an administrative oversight body such as the Review Officer is based on its independence, impartiality and consistency. To that end, it is appropriate to rely on precedents that are relevant to any Review before the Review Officer.
13. Section 38 of the *Act* gives the Review Officer the power to request the production of all information deemed to be relevant for examination during the course of the Review process.

**RECOMMENDATIONS:**

1. That Justice release the Record to the Applicant severing the images of third parties, such as any other inmates if any, but not any of the correctional or health care employees.
2. Alternatively, and as a minimum step, that Justice permit the Applicant, the Applicant's agent, a lawyer, and/or the Applicant's Expert witness to view the DVDs onsite or at an agreed location as many times as needed to satisfy their needs.
3. That Justice search again for additional recordings taken with the handheld video camera, dates for which recordings are being provided to Justice under a separate cover
4. If and when the additional videos are found, that Justice make an access decision to the Applicant consistent with recommendations 1 and 2 above.

Respectfully,

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