REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-10-26

Report Release Date: October 28, 2010

Public Body: Nova Scotia Securities Commission

Issues: Whether the Nova Scotia Securities Commission ["Commission"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether this is a request for personal information and, therefore, not subject to the application fee.
2. Whether the release of the Record would reasonably be expected to harm investigative techniques pursuant to s. 15(1)(c) of the *Act*.
3. Whether release of the Record would unreasonably invade the privacy of third parties pursuant to s. 20 of the *Act*.
4. Whether the personal information of the Applicant supplied by third parties was supplied in confidence. If yes, whether a summary under s. 20(5) of the *Act* possible.
5. Whether s. 21 of the *Act* applies to the Record.
6. Whether the Commission has properly exercised its discretion to apply the discretionary exemption(s).
7. Whether the Commission has applied the exemption(s) in a blanket manner or whether severing could have been applied to the responsive Record in accordance with s. 5(2) of the *Act*.
8. Whether the public interest override at s. 31 of the *Act* is a factor that should be considered in this case.
9. Whether the confidentiality provisions of *Securities Act* prevail over the *Act*, under s. 4A.
10. In addition, whether the Review Officer will accept all of the late discretionary exemptions.
11. If yes to #10, whether release of the Record would reasonably be expected to reveal information received in confidence from

another government, body, or agency listed in s. 12(1)(a) of the *Act*.

12. If yes to #10, whether release of the Record would reasonably be expected to harm law enforcement pursuant to s. 15(1)(a) of the *Act.*
13. If yes to #10, whether release of the Record would reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion pursuant to s. 15(1)(f) of the *Act*.
14. If yes to #10, whether the Record is a law enforcement record and the disclosure would be an offence under an enactment pursuant to s. 15(2)(a) of the *Act*.
15. Whether the Commission has breached its statutory duty to assist under s. 7 of the *Act*

Record at Issue

Pursuant to s. 38 of the *Act*, the Commission has provided the Freedom of Information and Protection of Privacy ["FOIPOP"] Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff. The Record consists of a 14-page Investigation Report that the Investment Industry Regulatory Organization of Canada ["IIROC"] completed and forwarded to the Commission.

Summary:

An Applicant made a Request for Review of the Commission's decision to refuse access to a Record. The Commission originally cited s. 15(1)(c) of the *Act* [harm to investigative techniques] and subsequently claimed other exemptions: two mandatory [s. 20 unreasonable invasion of third party privacy and s. 21 confidential business information] and four late discretionary [s. 12(1)(a) inter-governmental relations, s. 15(1)(a) harm law enforcement, s. 15(1)(f) prosecutorial discretion, s. 15(2)(a) law enforcement and offence to release]. The late exemptions were rejected by the Review Officer as well beyond a reasonable time. Because many of the late exemptions the Commission attempted to claim late did not apply, the Review Officer provided a discussion on each without making findings. Public interest was considered relevant to the release the information to the Applicant.

Findings:

The Review Officer made the following findings:

1. The Record is largely made up of the Applicant's personal information, to which s/he is *prima facie* entitled under the *Act* and the Commission should return the $5 application fee to the Applicant.

2. Subsection 15(1)(c) of the *Act* does not apply and the Commission erred in relying on this exemption as there was no evidence that the release of the Record could reasonably be expected to harm the effectiveness of the Commission's investigative techniques.
3. For all mandatory exemptions, even if claimed late or not claimed at all, it is incumbent on the Review Officer to consider their applicability to the Record.
4. Subsection 20(1) of the *Act* does apply in this case and the Applicant is not taking issue with it being applied. S/he did not want access to third party information and therefore does not have the burden of proof to access it.
5. The Commission erred by relying only on s. 21(1)(c) and not on the whole of the exemption under s. 21. Second, the Commission failed to meet its onus to provide evidence or information to meet the three-part-test in s. 21 of the *Act*.
6. The Commission erred by applying all of the exemptions as blanket exemptions and therefore, the Commission has erred in failing to exercise its discretion as to how each of the discretionary exemptions, in particular s. 15(1)(c), applies to each line of the Record. On review of the content of the whole Record, I find that it is not possible that any of the exemptions could apply to the Record in its entirety.
7. The public interest in s. 31 of the *Act* is served by the Commission providing the Applicant with access to all of his/her personal information in the IIROC Report in the Record.
8. The Commission inappropriately operated on the basis that the confidentiality provision in s. 29A of the *Securities Act* prevailed over the *Act*. The Commission erred in exercising its discretion when it represented that the confidentiality provisions in the *Securities Act* trumped the Applicant's right of access in the *Act.*
9. All the late discretionary exemptions are rejected and I find that to allow the Commission to claim exemptions this late downplays the importance of timelines and is not in the public interest.
10. The Commission has breached its statutory duty to assist under s. 7 of the *Act*.

Recommendations: The Review Officer made the following recommendations to the Commission:

1. To return the $5 application fee charged to the Applicant; and
2. To release the complete Record to the Applicant with all third party personal information severed.

Key Words: affidavit, agent, burden, clients, concrete evidence, confidential, consent, counsel, discretion, employers, evidence, fee, financial, harm, inter-governmental, investigation, investigative techniques,

investors, late exemptions, law enforcement, onus, paramount, personal information, professional organization, prosecution, public interest, redacted, self-regulatory, third party, trump, work.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2, 3(1)(i), 4A, 5(2), 7, 11(4), 12(1)(a), 15(1)(a), 15(1)(c), 15(1)(f), 20(1), 20(3), 20(5), 21(1), 31(1), 31(4), 38, 45; Securities Act ss. 27, 29, 29A, 29AA, 29EA, 30.*

Case Authorities Cited: *Nova Scotia Review Reports FI-08-23, FI-09-40, FI-07-38, FI-02-81, FI-08-107, FI-07-04, FI-04-42, FI-03-14, FI-02-37; OPC 2009-018; Atlantic Highways Corporation v. Nova Scotia [1997 CanLII 11497 (NSSC)]; Chesal v. Attorney General of Nova Scotia [2003 NSCA 124]; Grant v. Torstar Corp., [2009 SCC 61]; Turnpointe Wealth Management Inc and F.S. [Review of Director's Decision, NS Securities Commission, August 19, 2010].*

Other Cited: *FOIPOP Review Office Late Exemption Policy; Securities Act Recognition Order [Section 30]; IIROC website: www.iiroc.ca/english/enforcement/investigations; Securities Commission website: www.gov.ns.ca/nssc.*

REVIEW REPORT FI-10-26

BACKGROUND

On February 1, 2010 the Applicant filed a Form 1 Application for Access to a Record with the Nova Scotia Securities Commission ["Commission"], which requested the following:

> *1. This is an application pursuant to the Freedom of Information and Protection of Privacy Act for access to (check one):*
>
> *(b) other information . . .*
>
> *2. I am applying for access to the following record:*
>
> *IIROC report produced in Sept or Oct 2009 for NSSC after conclusion of investigation of circumstances surrounding my termination from [name of employer].*

On February 5, 2010, the Applicant was informed s/he had to pay an application fee before the Form 1 could be considered filed. This was paid the same day.

On March 5, 2010, the Commission made the following decision:

> *We are refusing access to the record for the following reasons:*
>
> *The IIROC Report was received in regard to an ongoing investigation thus pursuant to clause 15(1)(c) of the Act, your request is refused.*

On March 30, 2010, the Review Office received the Applicant's Request for Review dated March 26, 2010, which reads as follows:

> *This request for review arises out of an Application for Access to a Record or Request for Correction of Personal Information submitted to N.S.S.C. on the 1st day of February, 2010, a copy of which Application or Request is attached to this Request for Review.*
>
> *The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body; decision dated or made on the 5th day of March, 2010 . . .*
>
> *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 April 15, 2010, the Commission delivered the responsive Record to the Review Office. The Commission confirmed that the whole of the Record had not been disclosed to the Applicant pursuant to s. 15(1)(c) of the *Act.* The Commission requested that confidentiality of the Record be maintained and only viewed by the Review Officer. The Commission was advised that as the Review Officer, I give delegations to all staff under the *Act*, each take an Oath of

Confidentiality and, therefore, the Review process would proceed as usual with the designated staff having access to the Record.

During the course of the Review, the Commission chose to have counsel act on its behalf.

In this case, I find it unnecessary to document each and every step taken by the parties and the Review Office during the Review process. It is important to note that the Review Office attempted on numerous occasions to provide the parties with detailed information about the governing statute and relevant precedents relating to how particular exemptions have been interpreted in the past. This was in an attempt to focus the Review, to attempt informal resolution and to assist the parties in preparing their Representations if the matter proceeded to formal Review. These attempts included a letter dated April 29, 2010, a letter dated July 6, 2010, the Investigation Summary dated August 3, 2010, and the Revised Investigation Summary dated September 7, 2010. During the course of the Review, the Commission claimed multiple late exemptions [sections 12, 15(1)(a), 15(1)(f), 15(2)(a), 20(3)(b) and 21(1)(c)(ii)]. Due to the number of late exemptions, each will be addressed in the Discussion section instead of including them in this section.

Informal resolution was not successful. Mediation was not attempted.

RECORD AT ISSUE

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

The Record consists of a 14-page Investigation Report that the Investment Industry Regulatory Organization of Canada ["IIROC"] completed and forwarded to the Commission – the "IIROC Report".

REPRESENTATIONS

Due to the number of Representations submitted in regards to this file, they will be included in the discussion of the issues only and to the extent necessary to make my findings. Two of the Commission's Representations were also decisions as they contained the late exemptions.

APPLICANT'S REPRESENTATIONS

I have thoroughly reviewed and considered the Representations from the Applicant dated March 26, May 3, June 7, July 19, August 15, August 20, and September 1, 2010.

PUBLIC BODY'S REPRESENTATIONS

I have thoroughly reviewed and considered the Representations from the Commission dated May 13, May 18, June 3, June 8, July 22, August 27 and September 23, 2010.

ISSUES UNDER REVIEW

1. Whether this is a request for personal information and, therefore, not subject to the application fee.
2. Whether the release of the Record would reasonably be expected to harm investigative techniques pursuant to s. 15(1)(c) of the *Act*.
3. Whether release of the Record would unreasonably invade the privacy of third parties pursuant to s. 20 of the *Act*.
4. Whether the personal information of the Applicant supplied by third parties was supplied in confidence. If yes, whether a summary under s. 20(5) of the *Act* possible.
5. Whether s. 21 of the *Act* applies to the Record.
6. Whether the Commission has properly exercised its discretion to apply the discretionary exemption(s).
7. Whether the Commission has applied the exemption(s) in a blanket manner or whether severing could have been applied to the responsive Record in accordance with s. 5(2) of the *Act*.
8. Whether the public interest override at s. 31 of the *Act* is a factor that should be considered in this case.
9. Whether the confidentiality provisions of *Securities Act* prevail over the *Act*, under s. 4A.
10. In addition, whether the Review Officer will accept all of the late discretionary exemptions.
11. If yes to #10, whether release of the Record would reasonably be expected to reveal information received in confidence from another government, body, or agency listed in s. 12(1)(a) of the *Act*.
12. If yes to #10, whether release of the Record would reasonably be expected to harm law enforcement pursuant to s. 15(1)(a) of the *Act.*
13. If yes to #10, whether release of the Record would reasonably be expected to reveal any information relating to or used in the exercise of prosecutorial discretion pursuant to s. 15(1)(f) of the *Act*.
14. If yes to #10, whether the Record is a law enforcement record and the disclosure would be an offence under an enactment pursuant to s. 15(2)(a) of the *Act*.
15. Whether the Commission has breached its statutory duty to assist under s. 7 of the *Act.*

DISCUSSION

There may be information or evidence discussed in this Review Report which may directly or indirectly identify the Applicant. The usual practice of the Review Office is to keep the identities of the parties, except the public body, confidential. We expect the delegated authorities within public bodies to do the same, only identifying an applicant to anyone including employees of the public body on a "need to know" basis. In this case, at the formal Review stage I indicated to the Applicant there may be a chance to identify him/her based on some of the information I wanted to include in the Review Report. I would include that information,

however, only if s/he consented. On October 15, 2010, the Applicant provided his/her consent to the information being included in the Review Report.

WHETHER THE RECORD CONTAINS THE PERSONAL INFORMATION OF THE APPLICANT

Right to Access to one's own personal information

Personal information is defined in the *Act,* which reads as follows:

3(1) In this Act,

> *(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;*

A review of the Record reveals that a large portion of it contains the Applicant's personal information and s/he is in fact the sole subject of the IIROC Report. Specifically, I note the following types of information about the Applicant in the Record:

- the individual's name, address, and telephone number
- information about the individual's financial and employment history
- anyone else's opinions about the individual

These types of information are all included in the definition of "personal information" cited above. One of the purposes of the *Act* is to give individuals ***the right to access their own personal information.*** The fact that public bodies are not permitted to charge a fee to an individual applying for access to his/her personal information demonstrates the importance of the right under the *Act*. The Review Officer has upheld this right in two recent decisions *[Refer to FI-08-23 and FI-09-40]* both of which involved public bodies denying applicants access to their own personal information.

I find the Record is largely made up of the Applicant's personal information, which s/he is entitled to access under the *Act*, subject to any applicable exemptions discussed below.

Fees

On February 5, 2010, the Commission advised the Applicant to pay an application fee of $5 before his/her request would be processed. The applicable section of the *Act* is s. 11(4) that provides that fees ***do not apply to a request for the applicant's own personal information.***

The wording of the Applicant's Application for Access to a Record is:

> *IIROC Report produced in Sept or Oct 2009 for NSSC after conclusion of investigation of circumstances surrounding my termination from [name of employer].*

Personal information is information about an identifiable individual. The Privacy Commissioner of Canada issued a case summary *[Refer to 2009-018]* where an applicant was denied access to records because s/he had been "anonymized". In that case it was found that a broad interpretation of personal information is justified and that if there is a serious possibility that someone could identify the available information and it was possible to link it to a person, it is personal information.

During the Review, when this was brought to the attention of the Commission, it disagreed that it was a personal record and refused to return the fee to file an Application for Access to a Record of $5 because the Applicant had ticked the "all information" box on the Form 1 instead of "personal information". Other than this error on the Form 1, the Applicant has made it clear from the outset that s/he wants his/her personal information contained in the investigation report making up the Record. Under the duty to assist – *make every reasonable effort to assist* - the Commission should have enabled the Applicant to amend the Form 1 to include personal information and it ought to have returned the fee *[Refer to s. 7 of the Act]*. The Record is comprised primarily of the Applicant's personal information. The remainder is largely third party personal information, which the Applicant has made it clear s/he is not requesting.

If questioned, the onus is on the Commission to demonstrate how the Record is not the personal information of the Applicant. It has failed to provide any Representation or evidence to demonstrate that the information in the Record does not fall within the statutory definition of personal information. A fee is not appropriate where the Record contains the Applicant's personal information.

WHETHER THE SUBSECTION 15(1)(C) EXEMPTION – INVESTIGATIVE TECHNIQUES – APPLIES

The sole exemption the Commission claimed in its decision letter dated March 5, 2010 to the Applicant was s. 15(1)(c), which reads:

> *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;*

The Courts have consistently held that the work of the Commission can be characterized as law enforcement. The Commission provided an extensive Representation with respect to the role of the Commission under the *Securities Act.* That was of interest and certainly it would be appropriate for the Commission to take its statutory mandate into account in exercising its discretion under access to information legislation and s. 15 of the *Act* regarding law enforcement, which may be an exemption to rely on in future instances.

In order for this exemption to apply, however, the Commission must demonstrate that ***its own*** investigative techniques are unique and if disclosed may cause harm to their effectiveness. By its own Representation, the Commission has stated it has no jurisdiction over the investigation conducted by IIROC. The most important fact here is that any unique features of the investigation reported in the Record are those of its author – IIROC – not the Commission's. There is no investigation conducted by the Commission reported or referred to in the Record.

The Commission provided no evidence with respect to how the Record disclosed any investigative techniques used by IIROC that would be compromised by the Record's release. I have no evidence the Commission contacted IIROC with respect to whether the release would compromise its investigative techniques despite the Commission being asked during the Review process to provide more details in this regard.

I have no evidence that IIROC would object – quite the contrary. While IIROC is aware that the confidentiality provision under the *Securities Act* precludes it from giving the Report directly to the Applicant, it provided the Commission with a redacted version of its Report for the anticipated purpose of it being provided to the Applicant by the Commission. The Applicant provided a copy of an email s/he received from senior management at IIROC that reads, in part, as follows:

> *Subsequently, it occurred to me that I had been under the impression that you or perhaps your counsel had requested a copy of our investigation report from NSSC under the Freedom of Information Act.* ***IIROC had provided NSSC with a copy of our investigation report (with appropriate parts of the report blacked out) for this purpose. I would have thought you had seen it.***
> ***[Emphasis added]***

I am satisfied that IIROC would not have responded to the Applicant in this fashion or provided a redacted copy of the Record to the Commission if it felt the release of the Record would compromise its investigative techniques. IIROC's website also provides an outline of its investigation procedures *[Refer to www.iiroc.ca/english/enforcement/investigations]*.

Because there is no evidence of a reasonable expectation of harm to any investigative techniques, the exemption does not apply in this case. The Record is a Report prepared by IIROC not by the Commission. IIROC prepares the Report for the Commission and it is the

latter that is responsible to make a decision under the *Act* with respect to its release to the Applicant pursuant to his/her Application for Access to a Record.

I find that s. 15(1)(c) of the *Act* does not apply and that the Commission erred in relying on this exemption.

WHETHER THE COMMISSION HAS PROPERLY EXERCISED ITS DISCRETION UNDER SUBSECTION 15(1)(C)

The finding that the exemption in s. 15(1)(c) does not apply means how the Commission exercised its discretion to withhold is no longer relevant with respect to this exemption. In addition, the manner in which the Commission has applied the exemption demonstrates it has not exercised its discretion but chosen to apply it as a class exemption: investigation report means withhold the entire Record. This will be discussed below under Blanket Exemptions.

MANDATORY EXEMPTIONS – SECTIONS 20 AND 21

The Commission claimed two late mandatory exemptions. The Commission's claim to the remaining discretionary late exemptions will be discussed below. In the case of a mandatory exemption, if the exemption applies the public body has no choice but to claim the exemption and withhold the Record. The Review Officer, similarly, has no authority not to consider any mandatory exemption, regardless of whether or not it has been originally claimed; that it has been claimed late is not a factor.

WHETHER SECTION 20 WITH RESPECT TO UNREASONABLE INVASION OF THIRD PARTIES APPLIES

The first mandatory exemption the Commission claimed was under s. 20(1) of the *Act,* which the Commission stated applied to the whole Record. That exemption 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*** *. . .*
>
> *20(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if . . .*
>
> > *(b) the personal information 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; . . .*
>
> *20(5)On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.*
> ***[Emphasis added]***

The Applicant has been perfectly clear from the outset of the Review that s/he does not want access to third party personal information. The Commission appears to have largely ignored this factor when claiming this exemption. Thus, the only issue is whether the third party information can be severed so the Applicant may have access to his/her personal information and possibly any other information in the Record not related to third parties *[Refer to s. 5(2) of the Act]*. A redacted version of the Record was given to the Commission by IIROC. The Commission refused to provide a copy of that redacted copy of the Record to the Review Office, despite being requested to do so. The evidence suggests that the IIROC redacted version has severed the identifiable information about third parties as it was assuming that version would be shared with the Applicant. The fact that a redacted copy was provided demonstrates clearly that the third party information could be severed in a way that would not reveal third party identities while still providing the Applicant with access to the remainder of the Record.

If the Commission thought it was impossible to prepare a redacted Record on the basis of this exemption, the Commission was under a duty to provide a summary of the Record to the Applicant. The Commission did not provide any evidence that the information provided by third parties to IIROC was supplied in confidence, despite a request to do so during the Review. In its final Representations the Commission argued that s. 20(5) of the *Act* did not apply in this case because it was impossible to summarize the Record without identifying the third parties. The fact that IIROC was able to prepare a redacted copy to meet its own confidentiality requirements, sets aside both arguments by the Commission that a redacted version was not possible and that a summary was not possible without identifying the third parties.

In conclusion, I find that s. 20(1) of the *Act* applies to some of the information because there is third party personal information in the Record. The Applicant agrees and has made it clear from the onset that s/he is not interested in this information therefore there is no need to go further as the Applicant does not need to rebut the presumption of unreasonable invasion of privacy. To be clear, this does not apply to the views and opinions expressed about the Applicant by the third parties, which by definition is the personal information of the Applicant.

WHETHER THE SECTION 21 EXEMPTION WITH RESPECT TO CONFIDENTIAL INFORMATION APPLIES

The Commission claimed a second mandatory exemption, citing s. 21(1)(c) of the *Act,* which again it claimed applied to the whole Record. That exemption section reads as follows:

21(1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or
(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
(iii) result in undue financial loss or gain to any person or organization, or
(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.
[Emphasis added]

The exemption in s. 21 of the *Act* has been the subject of many cases before the Nova Scotia Supreme Court and the Review Officer. This exemption is intended for records regarding business matters including trade secrets, commercial and financial information *[Refer to FI-07-38]*. The Record in this case does not involve business matters. It involves an investigation about the Applicant involved in a particular commercial endeavour.

The Nova Scotia Supreme Court has established the manner in which s. 21(1) should be approached; the subsection is to be read conjunctively and all three parts [(a), (b), and (c)] must be satisfied for the exemption to apply. Once all three parts are met, it is mandatory for the public body to withhold the record. In *Atlantic Highways Corporation v. Nova Scotia*, Judge Kelly provided a clear analysis of how s. 21(1) is to be read, when he stated:

. . . that a party seeking to apply [section 21] to restrict information must satisfy the relevant authority or the court that the information ***satisfies each of the lettered sub-sections of s. 21(1).***

For purposes of considering the application of s. 21(1), I suggest the burden the Appellant AHC must satisfy under that section to qualify the Omnibus Agreement as exempted information must be to satisfy the court of the following:

(a) that disclosure of the information would reveal trade secrets or commercial financial, labour relations, scientific or technical information of a third party;
(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and
(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).
[Atlantic Highways Corporation v. Nova Scotia 1997 CanLII 11497 (NSSC)]
[Emphasis added]

What is important in this case is that the Commission only relied on s. 21(1)(c) and again claimed the subsection applied to the Record in its entirety. The Commission attempted to rely on one aspect of s. 21 to say that release of the Record would dissuade the public from providing

similar information in the future. Why reliance on one part of s. 21 is not enough has been made clear by our Courts. The Review Office requested more information from the Commission as to how this exemption applied to this Record, which was not provided. In addition, the Review Office explained how s. 21 had been applied by our Courts and the Commission neither expanded on how the whole of the exemption applied nor did it agree to withdraw the exemption when it was provided with this information.

I find the Commission erred by relying only on s. 21(1)(c) and not on the whole of the exemption under s. 21. Second, I find that the Commission failed to meet its onus to provide evidence or information to meet the three-part-test in s. 21 of the *Act*.

WHETHER THE COMMISSION APPLIED BLANKET EXEMPTIONS

The Commission claims that all five discretionary exemptions [the four that have not been discussed yet will be addressed below] and both mandatory exemptions apply equally to the entire Record while arguing at the same time that it has not applied any as a blanket exemption. The Review Office pointed out to the Commission that on reviewing the Record this did not appear possible or plausible. Thereafter the Commission was given the opportunity to refine its decision to provide more specifics as to which of the exemptions applied to the Record, line by line. It refused to do so claiming all of the exemptions applied to the whole of the Record and continued to claim it was not applying them as blanket exemptions. The Commission claims it is not possible to sever the Record to include only the information to which the Applicant is entitled under the *Act* yet IIROC was able to provide a redacted copy to the Commission removing what it considered to be third parties' personal information.

The Nova Scotia Court of Appeal has made it clear that the *Act* does not create classes of documents that are automatically subject to exemption.

> *[57] To give effect to the appellants' submissions would be to create a blanket privilege for all information pertaining to an aboriginal government. It would matter not whether the information contained in the Audit Report is critical or supportive of the aboriginal policing initiative. It is the position of the appellants that it may not be disclosed without consent. Section 12(1)(a) of the FOIPOP Act clearly does not establish a class exemption from disclosure for all information flowing between governments.*
>
> *[58] In Do-Ky et al. v. Canada (Ministers of Foreign Affairs and International Trade), (1999), 173 D.L.R. (4th) 515; F.C.J. No. 673 (Q.L.) (F.C.A.) (Q.L.), affirming, (1997), 143 D.L.R. (4th) 746; F.C.J. No. 145 (Q.L.) (F.C.T.D.) a similarly worded section of the federal Access to Information Act, R.S.C. 1985, c. A-1, was held not to create a class exemption for diplomatic exchanges between governments. Under consideration was s.15(1) of that Act. There, the applicant's request for disclosure of four diplomatic notes exchanged between Canada and another foreign state had been refused by the Minister of Foreign Affairs and International Trade. The refusal was upheld on judicial review by the Federal Court. The package of information in dispute was three notes sent by Canada to the foreign country and one note from that country to Canada. It was*

accepted that the four notes constituted a dialogue between the governments of the two countries.

[60] On appeal to the Federal Court of Appeal, in the course of affirming the decision of the trial court, Sexton, J.A. was careful to point out that s. 15(1)(h) did not create a "class exemption" for diplomatic notes. He said:

> *[8] We should stress however that there is no "class exemption" for diplomatic notes. Under section 15(1) there is no presumption that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations. There must be evidence of this. Certainly where the documents contain information which, for example, might cast doubt on the commitment of another country to honour its international obligations and that other country objects to the disclosure, the case for exemption will have been made out.*

[Chesal v. Attorney General of Nova Scotia 2003 NSCA 124]

Relying on the Court of Appeal's decision in *Chesal,* in *FI-03-50* the Review Officer held that public bodies cannot *replace the exercise of discretion with a blanket policy* for a particular kind of report. In that case it was peer reviews in hospitals. In this case it is an IIROC Report prepared for the Commission *[Refer also to FI-02-81].*

The Review Office explained to the Commission that it is not in accordance with precedent to have a public body rely on seven exemptions and claim they all apply equally to the whole of the Record. It is almost inconceivable to imagine how all of the exemptions including the ones claimed late could apply to each and every line of this Record. When given the opportunity to refine how it had applied each of the exemptions to each line of the Record, the Commission refused to do so and continued to represent that it was not applying them as blanket exemptions while at the same time claiming all five discretionary exemptions apply to the entire Record.

I find the Commission erred by applying all of the exemptions as blanket exemptions and therefore I find the Commission has erred in failing to exercise its discretion as to how each of the discretionary exemptions, in particular s. 15(1)(c), applies to each line of the Record. On review of the content of the whole Record, I find that it is not possible that any of the exemptions could apply to the Record in its entirety.

WHETHER PUBLIC INTEREST IN SECTION 31 IS A FACTOR

The *Act* makes provision for the release of information for any reason that is clearly in the public interest. The exemption in s. 31 prevails over all other provisions in the *Act* including discretionary and mandatory exemptions to withhold information.

31(1) Whether or not a request for access is made, the head of a public body may disclose to the public, to an affected group of people or to an applicant information

(a) about a risk of significant harm to the environment or to the health or safety of the public or a group of people; or
(b) the disclosure of which is, for any other reason, clearly in the public interest . . .

(4) This Section applies notwithstanding any other provision of this Act.
[Emphasis added]

The Applicant represented that his/her inability to obtain a copy of the Record was hampering his/her ability to continue working in his/her profession. Recently, the Commission made a decision in a licensing application, referred to below, that made the same observation with respect to the Commission's Enforcement Division's conduct impacting on a person's right to work in his/her chosen profession.

The Commission in this Review argues that benefit to only one person cannot meet the public interest test. In a recent Review Report, I found that public interest is not synonymous with what interests the public but rather an issue about which the public may have substantial concern *[Refer to FI-08-107]*. The public has an interest to know the outcomes of investigations into people working in the financial field and to that end the Commission publicly posts its enforcement decisions. Given the statutory mandate to protect the public, the Commission has made decisions and information available on its website *[Refer to www.gov.ns.ca/nssc]*. The publications are clearly intended to educate the public in making informed decisions about investment advisors. The public is entitled to know the status of any proceedings about the Applicant.

[102]How is "public interest" in the subject matter established? First, and most fundamentally, the public interest is not synonymous with what interests the public. The public's appetite for information on a given subject — say, the private lives of well-known people — is not on its own sufficient to render an essentially private matter public for the purposes of defamation law. An individual's reasonable expectation of privacy must be respected in this determination. Conversely, the fact that much of the public would be less than riveted by a given subject matter does not remove the subject from the public interest. ***It is enough that some segment of the community would have a genuine interest in receiving information on the subject.***
[Emphasis added]
[Grant v. Torstar Corp., 2009 SCC 61]

When IIROC advised its investigation was completed and its file closed, it referred to it as "good news." The Commission has, however, taken the position publicly that the closing of IIROC's file is not an exoneration of the Applicant and that it is only confirmation that the file has been closed by IIROC. While the Commission argues s. 31 does not apply, its own conduct in making public declarations about the status of the Applicant's file has brought this case within the purview of public interest. Suggesting it still has an ongoing investigation about the Applicant suggests by innuendo that there may be continuing concerns and merit to the original allegations against the Applicant. In this case, the public interest is served by requiring a public

body to provide access to the individual, whose professionalism s/he claims has been impugned by the Commission's public comments, to his/her personal information. The Commission fails to see how the information being sought "for the benefit of a single person" could be considered disclosure in the public interest. As emphasised in the Supreme Court of Canada decision above, the former clients, potential clients and potential employers of the Applicant [a definable segment of the community] would have a genuine interest in knowing the outcome of the IIROC Report.

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

I find the public interest in s. 31 of the *Act* is served by the Commission providing the Applicant with access to all of his/her personal information in the IIROC Report in the Record.

WHETHER THE CONFIDENTIALITY PROVISIONS OF THE *SECURITIES ACT* PREVAIL OVER THE *ACT* UNDER SECTION 4A

The Commission repeatedly relied on the confidentiality provision in s. 29A of the *Securities Act* to support an argument that it was the basis on which it was required not to disclose the Record. Section 29A of the *Securities Act* provides as follows:

> *29A (1) Except in accordance with Section 29AA, no person or company shall disclose at any time, except to their counsel,*
>
> > *(a) the nature or content of an order under Section 27 or 29; or*
> > *(b) the name of any person examined or sought to be examined under Section 27, any testimony given under Section 27, any information obtained under Section 27, the nature or content of any questions asked under Section 27, the nature or content of any demands for the production of any document or other thing under Section 27 or the fact that any document or other thing was produced under Section 27.*
>
> *(2) Where the Commission issues an order under Section 27 or the Minister issues an order under Section 29, all reports provided under subsection (15) of Section 27 or Section 29B, all testimony given under Section 27 and all documents and other things obtained under Section 27 relating to the investigation or examination that is the subject of the order are for the exclusive use of the Commission or of such other regulator as the Commission may specify in the order, and shall not be disclosed or produced to any other person or company or in any other proceeding except as permitted under Section 29AA.*

Under the *Act,* the Applicant has a statutory right to access information subject to specific applicable exemptions. But the Commission operated as if his/her right was trumped by the *Securities Act.* The Commission was correct to consider its obligation under its governing legislation when exercising its discretion under the *Act* as to whether the Record should be released. The Commission did not go far enough, however, when it failed to consider how the confidentiality provisions under the *Securities Act* applied in relation to the Applicant's right to access his/her personal information under the *Act.* The Commission treated its governing legislation as paramount, which in particular circumstances as defined by the *Securities Act* it may be *[Refer to ss. 27, 29, 29A, 29AA and compare to s. 29EA of the Securities Act]*, but not in this case.

The *Act* provides as follows:

> *4A (1) Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record,* ***the provision of this Act prevails over the provision of the other enactment unless subsection (2) or the other enactment states that the provision of the other enactment prevails over the provision of this Act.***
> ***[Emphasis added]***

Section 4A of the *Act* goes on to provide a list of enactments that restrict or prohibit access to any person where those specific enactments prevail over the *Act.* The *Securities Act* is not listed. The right of access particularly to personal information under the *Act* prevails over all other legislation unless that other statute specifically provides that it prevails over the *Act.* Section 29EA is the only provision in the *Securities Act* that specifically provides for when a record should be withheld under the *Freedom of Information and Protection of Privacy Act.* The section reads as follows:

> *29EA(3)* ***Notwithstanding the Freedom of Information and Protection of Privacy Act,*** *information and documents obtained pursuant to a review under this Section are exempt from disclosure under that Act if the Commission determines that the information and documents should be maintained in confidence.*
> ***[Emphasis added]***

This provision applies to when the Commission is conducting a review of disclosures by reporting issuer or mutual fund, which has no applicability to this case. I find that the Commission inappropriately operated on the basis that the confidentiality provision in s. 29A of the *Securities Act* prevailed over the *Act.* The Commission erred in exercising its discretion when it represented that the confidentiality provisions in the *Securities Act* trumped the Applicant's right of access in the *Act.*

WHETHER THE REVIEW OFFICER ACCEPTS THE COMMISSION'S CLAIM FOR LATE EXEMPTIONS

On March 5, 2010, the Commission claimed one exemption in its initial decision letter to the Applicant. After receiving a substantial overview of the relevant issues in a letter from the

Review Office dated April 29, 2010, the Commission responded by providing a Representation on May 18, 2010, including five new late exemptions. After receiving the Investigation Summary on August 3, 2010, the Commission's response was to provide another Representation on August 27, 2010, including a claim to another late exemption. Two of the late exemptions [s. 20 and s. 21(1)(c)] are mandatory and have been discussed above. The remainder of the late exemptions [ss. 12(1)(a), 15(1)(a), 15(1)(f) and 15(2)(a)] are discretionary.

As will be discussed below in more detail, the Commission is under a duty to assist the Applicant including providing a response *without delay, openly, accurately and completely [Refer to s. 7 of the Act]* at the time of issuing its disclosure decision. Progressively stockpiling additional exemptions over the course of the Review process, trying to justify to the Review Office why a record should be withheld, misses the point. It is the *applicant* who is entitled to an accurate and complete decision from the public body in response to his/her Application for Access to a Record. The Review Office has tried to be flexible and fair with respect to late exemption claims in order to enable public bodies to present their best case to defend their decisions once they know a Request for Review has been made. The Review Office policy to allow late exemptions is our attempt to be fair to public bodies when a Request for a Review is filed because the *Act* makes no provision for such. The late exemption time allotted coincides with the time period in which the public body is to provide a record to the Review Office *[Refer to the Late Exemption Policy: 15 days*]. In this case, the Commission appears to be showing a disregard for the requirement to make an accurate and complete decision at the outset in accordance with the statute by continuing to add on exemptions. Surprisingly, the Commission argued that the 15 days was only policy and not law. I am not sure why this point was made because the law – the *Act* – makes no provision for late exemptions. This means that only the exemption that was in the disclosure decision would be applicable in this case, however the Commission went on to cite six other exemptions, using the Late Exemption Policy. If what the Commission meant was that administrative fairness and not our Policy may govern how late is late, I agree.

In this case, what is notable is that the additional exemptions were claimed after the Review Office provided its initial analysis to the Commission. Only then, some 45 days after the Form 7 was provided to the Commission, did it choose to claim five new exemptions. Until prompted to do so, the Commission had given no notice to the Applicant regarding the late exemptions. Then, when the Investigation Summary was provided to the parties, the Commission responded by adding another new late exemption in its Representations, nearly 150 days from the date of the Form 7. This is unacceptable practice and on that basis, I reject all the late exemptions except the mandatory ones discussed above. I agree that *allowing public bodies to downplay the importance of timelines is not in the public interest.* I find that to allow the Commission to have any benefit it may garner from reliance on the late exemptions to justify its decision would be contrary to what is in the public interest. It would be unfair to the Applicant to allow the Commission this much latitude with respect to claiming late exemptions. I make this finding cognizant that the Commission's work is governed entirely by regulation and statute, it is accustomed to interpreting legislation, and, as such, is a public body used to working within the purviews of a statute and should be well-versed in its responsibilities under access and privacy legislation.

LATE EXEMPTIONS

While it is unnecessary to make findings on these late exemptions to dispose of this Review, I intend to discuss each for educational purposes. The findings in this section will not form part of the official findings and are for future guidance only.

1. Subsection 12(1)(a): This exemption is with respect to inter-governmental relations. The statute provides an exhaustive list of what is meant by a level of government.

   12(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

   > *(a) harm the conduct by the Government of Nova Scotia of relations between the Government and* ***any of the following or their agencies:***
   >
   > > ***(i) the Government of Canada or a province of Canada,***
   > > ***(ii) a municipal unit or school board,***
   > > ***(iii) an aboriginal government,***
   > > ***(iv) the government of a foreign state, or***
   > > ***(v) an international organization of states;***
   >
   > *(b) reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public.*

   In order for s. 12 of the *Act* to apply to a record it must be clear that disclosure could reasonably be expected to harm the conduct or relations between the Government of Nova Scotia and another level of government or one of *its* agencies. The levels of government are listed and the list exhaustive; federal government, another province, a municipal unit, school board, aboriginal government, foreign state or international organization of states *[Refer to FI-07-04]*. This exemption is established in recognition of the fact that governments may need to consult with other levels of government. In this Review there are no two levels of government at play. The Commission falls under the parameters of the provincial government of Nova Scotia but the author of the Record is an association that conducts regulatory functions for the Commission under a Recognition Order pursuant to s. 30 of the *Securities Act.* The Commission cannot rely on the inter-governmental affairs exemption under s. 12 as the Record does not contain an exchange of information between two levels of government. Thus the questions of expectation of harm or whether the information was provided in confidence are moot.

   Section 12 is about harm to conduct between the Government of Nova Scotia and other levels of government or their agencies: inter-governmental. The Commission did not provide any evidence to show that IIROC is an agency of the government. In fact, IIROC is a non-governmental self-regulatory organization that provides the service of

investigations for the securities industry across Canada. No provincial or federal access to information legislation applies to IIROC. Section 12 has no applicability to this case as IIROC is not an agency of any government.

In addition, even if IIROC was an agency, s. 12(1)(b) allows for the agency to consent to the disclosure. The Applicant has provided proof that IIROC had given the Commission a redacted version of the Report, evidence that senior management consented to the Applicant receiving a redacted copy of the Record from the Commission. The Commission, on the other hand, claims that consent was sought and not given by IIROC and the person who provided the above information to the Applicant was not acting with the authority of IIROC. The Commission did not provide any supporting evidence to substantiate its position. Based on the concrete evidence provided by the Applicant, I accept that IIROC is aware that it cannot release the document to the Applicant but that IIROC assumed the Commission would provide the Applicant with the redacted version which implies its consent.

2. Subsection 15(1)(a): This exemption permits a public body to refuse to disclose a record if there is a reasonable expectation the release would harm law enforcement activities.

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

The Commission states that it has an ongoing investigation that involves the Record and the Applicant. The Record is a *completed investigation by IIROC.* I have a letter provided by the Applicant addressed to him/her from IIROC at the completion of its investigation, which states in part:

> *Having reviewed the findings of the investigation, IIROC staff has determined that disciplinary proceedings will not be initiated in this case. As a result, we are closing our file on this matter.*

The Applicant was advised that in the ordinary course if after IIROC closed its file and the Commission initiated an investigation, s/he would receive notice to that effect. The Applicant indicates s/he has heard nothing regarding an ongoing investigation involving him/her from the Commission.

I remained unconvinced that there is an ongoing investigation at the Commission directly involving the Applicant and this Record. I requested the Commission provide some concrete evidence regarding the ongoing investigation such as an affidavit. My request read, in part, as follows:

> *Pursuant to s. 38 of the FOIPOP Act, I require the Commission to produce documentation or evidence to demonstrate that it has or had its own investigation*

> *related to the Applicant. While the Record is an investigation report, it was not prepared by you and has been complete for many months . . .*
>
> *But, in addition, now this matter is before me at the formal Review phase, I require you to produce the documentation or evidence [e.g. an affidavit may be suitable evidence]* ***as to the status of any investigation undertaken by the Commission itself at any time concerning this matter.*** *While I appreciate the sensitivity of investigations conducted pursuant to the Securities Act, the latter is not excluded under s. 4A of the FOIPOP Act and therefore determinations as to the applicability of exemptions under FOIPOP are solely within my jurisdiction.* ***[Emphasis added]***

In reply, I received a statement from counsel for the Commission advising s/he had been told by staff there is an ongoing investigation. The Commission claims, in error, that this kind of supporting information or evidence is not required under the *Act [Refer to s. 38(2)]*. The Commission responded as follows:

> *FOIPOP does not provide authority to request and/or provide evidence or an affidavit. Furthermore, as I have mentioned above and previously, I represent Staff of the Commission in my capacity as a lawyer. Throughout Staff's representations, prepared and provided by me, there have been numerous references to the fact that Staff is conducting an ongoing investigation which involves the Responsive Record and the Applicant. As an Officer of the Court, and as a Representative and Employee of the Commission and the Public Service, I have provided those representations. I trust that this is sufficient for confirmation of an ongoing investigation.*

The reason why such proof is required is because the onus is on the Commission to show that the exemption applies, it is not enough to just claim that it does. The claim needs to be supported as it is the claim that is being questioned and the point of the Review. In addition, it is not obvious from the content of the Record how the burden has been met. If this late exemption had been accepted in this Review, the Commission would have been required to produce concrete evidence pursuant to s. 38 of the *Act* demonstrating that in fact there is an ongoing investigation being conducted at the Commission that directly involves the Applicant and this Record *[Refer to FI-08-107]*. While I appreciate and respect the Representations have come from the Enforcement Division's counsel, s/he is relying on information from staff but this is not sufficient. Why is it imperative that a public body provide this supporting evidence and documentation? Pursuant to s. 45 of the *Act,* the Commission has the burden of proof throughout the Review process.

The delegated authority at the Commission is responsible to provide Representations under the *Act*. The Commission's decision to refuse to comply with my request as the Review Officer for any evidence of an ongoing investigation involving the Applicant would have worked against its interests.

Commission Members recently made a decision with respect to an application for registration to hold a licence. In its decision, the Commission reviewed an earlier decision within another division of the Commission in which reference was made to an alleged ongoing complaint, wherein it stated:

> ***However, Enforcement Division of this Commission held certain files "open" and refused to disclose the subject matters of the complaints or the identity of the complainants. We express concern about that position held by Enforcement, which might have the effect of depriving an applicant for registration and the right to work in his/her chosen profession. An unresolved and unidentified complaint against an applicant cannot be regarded as a trump card to be played at will, and it is extremely unfair to an applicant. [Emphasis added]***
> *[Turnpointe Wealth Management Inc and F.S. (Review of Director's Decision, NS Securities Commission, August 19, 2010]*

Refusing the Record because the Commission purports to have an open investigation directly involving the Applicant without providing *any* concrete evidence to that effect is extremely unfair, particularly given that the public body has a statutory duty to assist under the *Act*. Had I accepted this late exemption, I would have required more evidence other than a statement from the Commission's counsel as to there being an ongoing investigation in order for this exemption to have any application, as well as proof on how the release would harm that matter.

3. Subsection 15(1)(f): This exemption permits a public body to refuse access to a record if there is a reasonable expectation the release would reveal information otherwise protected within prosecutorial discretion.

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

> *(f) reveal any information relating to or used in the exercise of prosecutorial discretion; . . .*

This exemption is applicable when a record can be withheld because it records matters involving the exercise of prosecutorial discretion. All of the previous Nova Scotia Review Reports involving s. 15(1)(f) have related to files in the custody and control of the Public Prosecution Service *[Refer to FI-02-37, FI-03-14, FI-04-42]*. Past cases concluded s. 15(1)(f) supports the decision to deny access to the prosecutor's correspondence with respect to the exercise of prosecutorial discretion as well as to witness statements.

The responsive Record is the IIROC Report which was completed and then provided to the Commission. By its very nature it could not contain information on how the prosecutor exercised his/her discretion. There was no evidence provided by the Commission on the relationship between the IIROC Report and a prosecution.

4. Subsection 15(2)(a): This exemption permits a public body to withhold a record if releasing it would amount to an offence under a law.

   15(2) The head of a public body may refuse to disclose information to an applicant if the information

   > *(a) is in a law-enforcement record and the disclosure would be an offence pursuant to an enactment; . . .*

   The Commission has not provided the necessary evidence that the IIROC Report is in a law-enforcement record and the Commission has provided no evidence as to which enactment makes the disclosure and offence; the *Securities Act* does not.

STATUTORY DUTY TO ASSIST

The Commission plays an important role in protecting the public interest under the *Securities Act.* It is a concern, however, as to how it conducted itself as a public body under the jurisdiction of the *Act* with respect to the Application for Access to a Record *vis a vis* the Applicant and the Request for Review process *vis a vis* the Review Office. The Commission has a duty to assist under the *Act,* which provides as follows:

> *7(1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall*
>
> > *(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely; . . .*

The Commission does not appear to fully appreciate what the statutory duty to assist applicants requires. With respect to the conduct of the Commission, the following are examples of its failure to meet its duty to assist:

1. The Commission refused to treat the Form 1 Application for Access to a Record as including a request by the Applicant for his/her personal information. As a result it refused to return the $5 fee for information despite the fact that the Record clearly contained an abundance of the Applicant's personal information. The Applicant made a mistake on the Form 1 but it was correctable by the public body under its duty to assist. A simple reading of the Record by the Commission would reveal that the bulk of the Record is made up of the Applicant's personal information.
2. The Commission believes the late exemptions should be accepted, the last one claimed on August 27, 2010, because the Review Office timelines for late exemptions is only a policy and not the law. There is no provision in the law – the *Act* – for late exemptions. The Review Office Late Exemption Policy provides for a public body to claim a late exemption 15 days after the Form 7 Request for Review is filed. The Policy was established to give a public body the opportunity to strengthen its decision with new

exemptions after it was notified a Request for Review had been filed. What the Commission did in this case – progressive adding on of exemptions – is inconsistent with the Review Office Policy and with the Commission's duty to assist under s. 7 of the *Act.* The Commission also had to be advised by the Review Office to advise the Applicant of those new late exemption claims.

3. The Commission applied one exemption to the Record in its initial decision. Over the course of the Review, it sought to apply six more exemptions. The first set of five additional late exemptions were claimed over 45 days after the Form 7 Request for Review was filed. The Commission submitted it was in time but was mistaken about what material date to begin the 15 day count.
4. The Commission claimed that all of the exemptions applied to the whole of the Record. That means it is the Commission's position that the exemption with respect to inter-governmental relations applies equally to each line of the Record as the exemption for law enforcement and prosecutorial discretion and business confidences. Part of the duty to assist is to provide an accurate decision with respect to withholding the Record. Throwing a blanket of seven exemptions over every part of the Record serves to limit the right of access and is inconsistent with the duty to assist and the purpose of the *Act*.
5. The Commission denied the Review Office answers to specific questions and continued to represent it had provided answers to the questions by simply restating its reliance on all the exemptions.
6. The Commission refused to provide specific documents requested by the Review Office including a copy of the redacted copy of the Record provided by IIROC to the Commission.
7. The Commission refused to provide evidence requested by the Review Office such as an affidavit or any evidence to confirm the existence of the alleged ongoing investigation that involved the Applicant or the Record directly. The solicitor acting for the Commission's delegated authority – the FOIPOP Administrator – stated s/he was an officer of the Court and that was sufficient evidence. The problem is the solicitor is reporting on information given to him/her by staff at the Commission. Because the burden of proof is on the public body, it is essential to have concrete evidence because the Commission was seeking to rely on exemptions that relate directly to the existence of an ongoing investigation.
8. After providing precedents relating to how the exemptions have been interpreted in the past, the Review Officer gave the Commission the opportunity to withdraw its reliance on several of the exemptions, thus enabling the Review to be more focussed. This offer was rejected by the Commission.

This would appear to be a substantial number of departures from appropriate conduct for a public body under the *Act.* I would be remiss if I did not mention the many occasions these misunderstandings were brought to the attention of the Commission in exchanges with the Review Office. In addition to numerous phone exchanges, correspondence and reports were sent by the Review Office to the Commission trying to clear up these misunderstandings including on April 29, July 6, and August 3, 2010. Unfortunately, the responses from the Commission rejected all attempts to improve its understanding under the *Act* and the result was that its Representations were repetitive, unaltered, defensive and sometimes hostile.

I find the Commission has breached its statutory duty to assist under s. 7 of the *Act.* The Commission should be aware of the potential shadow cast on its statutory mandate to protect the public under the *Securities Act* by its failure to meet its statutory requirement to assist applicants under the access to information legislation.

FINDINGS

1. The Record is largely made up of the Applicant's personal information, to which s/he is *prima facie* entitled under the *Act* and the Commission should return the $5 application fee to the Applicant.
2. Subsection 15(1)(c) of the *Act* does not apply and the Commission erred in relying on this exemption as there was no evidence that the release of the Record could reasonably be expected to harm the effectiveness of the Commission's investigative techniques.
3. For all mandatory exemptions, even if claimed late or not claimed at all, it is incumbent on the Review Officer to consider their applicability to the Record.
4. Subsection 20(1) of the *Act* does apply in this case and the Applicant is not taking issue with it being applied. S/he did not want access to third party information and therefore does not have the burden of proof to access it.
5. The Commission erred by relying only on s. 21(1)(c) and not on the whole of the exemption under s. 21. Second, the Commission failed to meet its onus to provide evidence or information to meet the three-part-test in s. 21 of the *Act*.
6. The Commission erred by applying all of the exemptions as blanket exemptions and therefore, the Commission has erred in failing to exercise its discretion as to how each of the discretionary exemptions, in particular s. 15(1)(c), applies to each line of the Record. On review of the content of the whole Record, I find that it is not possible that any of the exemptions could apply to the Record in its entirety.
7. The public interest in s. 31 of the *Act* is served by the Commission providing the Applicant with access to all of his/her personal information in the IIROC Report in the Record.
8. The Commission inappropriately operated on the basis that the confidentiality provision in s. 29A of the *Securities Act* prevailed over the *Act*. The Commission erred in exercising its discretion when it represented that the confidentiality provisions in the *Securities Act* trumped the Applicant's right of access in the *Act.*
9. All the late discretionary exemptions are rejected and I find that to allow the Commission to claim exemptions this late downplays the importance of timelines and is not in the public interest.
10. The Commission has breached its statutory duty to assist under s. 7 of the *Act*.

RECOMMENDATIONS

I make the following recommendations to the Commission:

1. To return the $5 application fee charged to the Applicant; and
2. To release the complete Record to the Applicant with all third party personal information severed.

Respectfully,

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