REPORT
Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-10-41/FI-10-85/FI-10-86/FI-10-87

Report Release Date: June 1, 2011

Public Body: Transportation and Infrastructure Renewal

Primary Issues: Whether the Department of Transportation and Infrastructure Renewal ["Transportation"] appropriately applied the *Freedom of Information and Protection of Privacy Act* ["*Act*"] and, in particular:

1. Whether the public interest provision overrides all of the other exemption(s) claimed by Transportation.
2. Whether Transportation has caused inordinate delay. Whether the adequacy of the search for the Record has contributed to the delay. Whether Transportation's failure to meet its statutory duty to assist has contributed to the delay.
3. Whether "not responsive" can be used as an exemption.

Secondary Issues: The following are issues that arose during the Review process but which the Review Officer did not need to make Findings and Recommendations in order to dispose of the Review:

1. If the information that withheld under s. 12 of the *Act* were to be disclosed, whether the conduct of intergovernmental relations between the Government of Nova Scotia and a municipal unit would be harmed.
2. Whether the information withheld under s. 14 of the *Act* fits the definition of advice or recommendations.
3. If the information withheld under s. 17 of the *Act* were to be disclosed, whether the government would suffer financial or economic harm.
4. Whether the information withheld under s. 20 of the *Act* fits the definition of personal information. Whether the disclosure would be an unreasonable invasion of privacy. Whether s. 20(4) of the *Act* applies.

5. Whether the three-part test applies to the information withheld under s. 21 of the *Act*.
6. Where it has been determined that a discretionary exemption applies, whether Transportation has properly exercised its discretion to apply it.

Record at Issue

Pursuant to s. 38 of the *Act*, Transportation 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 number of document types including letters, emails, meeting minutes, handwritten notes and memorandums. The Applicant has chosen to focus on "key documents".

Summary:

An Applicant made multiple Applications for Access to a Record on behalf of a Residents' Group referred to as Protect the Bay. The multiple Requests for Review of the Transportation's decisions to withhold a significant portion of the Records were consolidated into one Review, as the Applications for Access to a Record were the same but for various consecutive time periods. Transportation withheld a large portion of the Record relying on many exemptions and a "not responsive" designation. The Review Officer found that the public interest override was paramount and that it should be applied in this case to release the remainder of the Record except for third party personal information.

Findings:

The Review Officer made the following Findings:

1. I agree with Transportation's decision to waive the fees based on public interest.
2. I find that the public interest in s. 31 of the *Act* is paramount and applies to the entire Record except for personal information of third parties.
3. I find that Transportation caused inordinate delay in this Review.
4. I find that the back and forth trying to pin down the exact parameters and content of the Record contributed to the delay.
5. I find that Transportation essentially ignored my decision to expedite the Review and caused delay by choosing to exceed the time allotments given to public bodies.
6. I find the resulting delays were unnecessary and inappropriate.
7. I find that "not responsive" cannot be used as if it were an exemption to withhold information that does not fit within any of the exemptions simply because the public body does not want to release it.

8. I find there are strings of emails identified as "not responsive" but clearly do not fit this description.
9. I find that Transportation's use of "not responsive" is wholly inappropriate and not permitted under the Nova Scotia legislation. Citizens have a right to access a Record.
10. I find that "not responsive" has been used by Transportation to shelter access to parts of the Record that are in fact responsive and do not fall under any exemption claimed.

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

1. Disclose the remainder of the Record, the portion previously withheld under a number of exemptions, with only third party personal information severed, because disclosure is clearly in the public interest. This would include any portion that relates to other projects as it has been identified as part of the responsive Record by Transportation.
2. In future Reviews, Transportation should make every effort to comply with any term or condition imposed by the Review Officer including the condition to expedite a Review.

Key Words: accurate, burden, complete, confidential, consent, delay, discombobulating, discretion, duty to assist, environment, expedited, fees, financial harm, limited and specific, justice delayed, justice denied, onus, open, nonsensical, not responsive, open-house, override, paramount, personal information, public interest, public meeting, third parties, waiver.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, ss. 2, 5(2), 7, 31, 38.*

Case Authorities Cited: *NS Review Reports FI-02-20, FI-08-107, FI-00-29, FI-07-58, FI-07-60, FI-07-72, FI-06-71(M), FI-07-59, FI-10-49/FI-10-51, Grant v. Torstar Corp., 2009 SCC 61, Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23*

BACKGROUND

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 might be a chance to identify him/her based on some of the information I wanted to include in the Review Report. On May 26, 2010, the Applicant provided his/her consent to be identified as representing the informal community group interested in the Record, the subject matter of the Review Report, as the "Residents' Group" and "Protect the Bay".

The Applicant has filed four separate Requests for Review stemming from four separate Applications for Access to a Record. As the scope is exactly the same, but for different periods of time, all four Requests for Review are being processed together as one Review.

On February 15, 2010, the Applicant made an Application for Access to a Record to the Department of Transportation and Infrastructure Renewal ["Transportation"], which stated:

> *I seek any and all information and documents related to [community name] Interchange Structure, Ramps and Connector to [provincial highway], including any draft or final environmental reviews or assessments, requests for proposals to conduct an environmental assessment, safety analyses and planning documents.*

As part of his/her Application for Access to a Record, the Applicant requested fees be waived and specified the following reason:

> *I am writing on behalf of local residents because this is a matter of great concern to the community. The concerns of the community justify waiving any fees associated with this application.*

The Applicant submitted a Request for Review dated and received May 25, 2011, which stated:

> *Thank you for letter dated May 17 regarding FOIPOP application TIR-10-06 (FOIPOP Review Office file number FI-10-25), [NOTE: this relates to a fee waiver file, and the "May 17 letter" from the Review Office is a letter notifying that the fee waiver file is closed] an application for documents related to the proposed [community name] connector road.*
>
> *As you know, 400 pages of documents were recently released to residents of [community name] with the $1017.00 in FOIPOP fees waived. We thank you and your colleagues for your support in that matter.*

Unfortunately, the documents released to us were heavily-censored and we must now ask for your office's intervention again to see that the unredacted versions are released to residents of this area.

The Applicant's four separate Applications for Access to a Record all contained the exact same wording as identified above, except each subsequent request was for only those records created since the previous request.

The Applicant filed four separate Requests for Review, all on the same grounds. The applicable file numbers and dates are:

- TIR-10-06, Application for Access to a Record submitted on February 15, 2010 / FI-10-41, Review Request received on May 25, 2010
- TIR-10-14, Application for Access to a Record submitted on May 10, 2010 / FI-10-85, Review Request received on November 22, 2010
- TIR-10-18, Application for Access to a Record submitted on July 18, 2010 / FI-10-86, Review Request received on November 22, 2010
- TIR-10-23, Application for Access to a Record submitted on September 23, 2010 / FI-10-87, Review Request received on November 22, 2010

Due to the fact that there have been multiple decisions on these four files and much of the content overlaps, the individual decisions are not being included in this Report. A summary of the disclosure decisions is included in lieu.

Disclosure Decisions:

May 17, 2010	Decision issued for FI-10-41 / TIR-10-06
July 17, 2010	Decision issued for FI-10-85 / TIR-10-14
September 9, 2010	Decision issued for FI-10-86 / TIR-10-18
October 26, 2010	Decision issued for FI-10-89 / TIR-10-23
October 27, 2010	Additional disclosure for FI-10-89 / TIR-10-23
November 19, 2010	Additional disclosure for FI-10-41 / TIR-10-06
March 23, 2011	Additional disclosure for FI-10-41 / TIR-10-06, FI-10-85 / TIR-10-14, and FI-10-86 / TIR-10-18

The following is a summary of Transportation's disclosure decisions:

- *Access has been granted in part to these records. The records you requested would contain information exempt from disclosure under Section 3 (1)(a)(i); 12(1)(a)(ii); 14(1); 17(1)(a)(b)(c)(d); 19(a)(b); and 20(1); 20(2)(a)(e)(g); 20(3)(f)(g); and 21(1) of the Act.*
- *In addition, information not responsive to your request is removed under "Not Responsive" ("N/R"), plus e-mails pertaining to the request for a copy of the RFP that started before February 17, 2010 and showing e-mail threads of this request have been removed as "Not Responsive" (N/R).*
- *Section 3(1)(i) background information was not factual.*

- *As a result, information falling into these categories has been severed from the file prior to disclosing it to you.*
- *As well, in the interest of time in providing the attached information third party information that could not be released in part has been severed in full. I am attempting to contact in writing those third parties requesting their views on the disclosure of their personal information. Once I receive their views whether they object or consent I will notify you. If consent is received to disclose records I will provide you with those records.*
- *In response to your request for draft or final environmental reviews or assessments, the environmental assessment has not been completed, therefore, we are unable to provide this information at this time. Once a final environmental assessment is approved, a copy will be disclosed according to the provisions of the Act.*

WAIVER OF FEES

The Applicant's Form 1 Application for Access to A Record requested a fee waiver, which was not initially addressed by Transportation. On March 10, 2010, Transportation provided a fee estimate to the Applicant in the amount of $1,017. The Applicant filed a Request for Review of the fee decision. It should be noted that the Review regarding fees does not form part of this Report *per se*. It does however, address issues relevant to these Reviews, which is why the following is included.

On May 7, 2010, after the Applicant contacted the Minister of Transportation about the fees, Transportation made a decision to waive the fees associated with processing the Application for Access to a Record, which decision read as follows:

> *In your representation to the Review Office you asked for a waiver of fees for the following reasons:*
>
> - *Residents cannot afford the fees*
> - *This matter is currently a subject of public debate*
> - *This matter has significant environmental and safety implications*
> - *Public understanding of [Transportation's] plans is vital to the public interest*
> - *Documents would help the community understand [Transportation's] plans*
> - *Disseminating information to the community is the goal of the FOIPOP application*
> - *We are able to disseminate the information.*
>
> *We have reviewed this request and have decided to grant you a fee waiver on the basis that the matter is currently a subject of public debate, that [it] does have environmental implications and that it is in the public interest. As per in accordance with subsection 11(7)(b) the record relates to a matter of public interest, including the environment or public health or safety. Therefore, a fee waive[r] in the public interest is granted. [Emphasis in the original]*

REQUEST TO EXPEDITE

On August 10, 2010, the Applicant made the following request to the Review Office:

There is considerable urgency to this request. Transportation Minister Estabrooks recently stated that he will decide in late fall 2010 whether the connector will be built. We therefore respectfully request that the FOIPOP Review Office expedite its review or it could simply be too late to help the concerned residents of [name of community].

On August 11, 2010, I responded to the Applicant as follows:

Your Applications for Access to a Record [2] have been responded to by the public bodies but the information provided was heavily redacted and as a result you fear that residents affected by the decision will not have an opportunity to consider all of the information to which they may be entitled prior to the decision being a fait accomplis. I note that the government has already agreed to waive the fees for your application and to consult based on the public interest in this matter. You have demonstrated that timeliness is of the essence with respect to this matter.

Your request to have your Request for a Review expedited is granted. It is important to note, however, that expedited files still move through each stage of the Review process which is not likely to be completed before your deadline. Also, there is a considerable workload at the Review Office some of which involves Reviews that are also expedited files, which are ahead of yours in the queue. Unfortunately it is not an option for this Office to ask government to postpone or delay its decision pending the outcome of a Review so despite your file being in the expedited queue there is no guarantee it will be completed prior to the government's decision.

It is open to you, however, to advise the Minister responsible, with whom you have communicated before, that the Review Officer has agreed to expedite your Request for Review and for you to contact the Minister responsible to ask for a delay in a decision in this regard should that prove to be necessary.

On September 21, 2010, the Review Office corresponded with Transportation to advise that the Review Officer had expedited the Review.

RECORD AT ISSUE

Pursuant to s. 38 of the *Freedom of Information and Protection of Privacy Act* ["*Act*"], Transportation 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 at issue is made up of a number of document types including letters, emails, meeting minutes, handwritten notes, and memorandums. The Applicant has chosen to focus on "key documents".

REPRESENTATIONS

Applicant's Representations

I have thoroughly reviewed and considered the Representations from the Applicant. Highlights of the Representations from the Applicant follow.

On May 25, 2010, along with his/her Request for Review, the Applicant made the following Representation:

Re: Decision Letter

- *The Department of Transportation's overzealousness in censoring information in the documents can be illustrated not only by the quantity of material deleted, but also be[cause] several sections in which the meaning of the deleted words is apparent – and therefore we can demonstrate that there is no justification under the FOIPOP for deleting the words."*
  [Emphasis in original]
- *Our concern is that if Transportation has deleted these sections without any justification under the FOIPOP Act, we have no doubt Transportation's 397 deletions, including 85 complete pages, include numerous other deletions that are not justified.*

Re: Public Interest

- *We therefore request that the FOIPOP Review Office help residents of this area gain access to the uncensored versions of these documents so we can better understand the proposed connector road's impact on our community.*

On October 14, 2010 the Applicant provided a further Representation by telephone, which is summarized as follows:

Re: Delays

- Transportation has been incredibly difficult to work with and taken every opportunity to hide information.

On October 19, 2010, the Applicant provided a Representation by email, which stated:

Re: Delays

- *[The FOIPOP Administrator's] pattern of applying the 30 day extension to all of our applications suggests [s/he] isn't doing it because [s/he] needs the extra time to process the documents, but rather that [s/he] is doing it as a means of delaying releasing documents to us as long as possible. [S//he] has also waited the full 30 days each time – instead of simply taking the additional time required to process the documents and then releasing them when they were ready – which also suggests that [s/he] is simply using the extension to delay releasing documents as long as possible.*

On January 5, 2011 the Applicant provided the following Representation:

Re Delays

- *Given my experience with [Transportation], I would offer the thought that they may be deliberately delaying your office's investigation and you should proceed with it. This is the sort of thing they've been doing to us for a year.*

On January 11, 2011 the Applicant provided a further Representation by telephone, which can be summarized as follows:

Re: Public Interest

- The Applicant wants information that helps the community to understand the decision.
- The Applicant is part of an informal community organization that shares and posts documents.
- The Application for Access to a Record is being done for a community reason.
- There was a public meeting held in June where 250 people attended, this was forced by the group.

On April 7, 2011, the Applicant provided his/her final Representation:

Re: Delays

- *[Transportation's] delaying tactics have made some [information], like the RFP responses, a bit moot. It bothers me on principle to let them get away with it but I accept that it makes sense to focus on key documents.*

Public Body's Representations

I have thoroughly reviewed and considered the Representations from Transportation. Highlights of the Representations from Transportation follow.

Transportation provided no Representations in its decision letters. Its decision letters merely recite the sections of the *Act* and their associated wording. There is no expansion on and no explanation as to how or why the exemptions fit this Record. For the other relevant issues beyond the application of the exemptions, Transportation has provided very little by way of Representations. This is despite being given multiple opportunities, despite being given extra time to prepare a Representation and despite being asked to address specific questions.

In order to be fair to Transportation, I have attempted to document a summary of the little information provided to the Review Office throughout the Review that addresses some of the issues.

On November 15, 2010, Transportation provided some information in a telephone conversation, which I have summarized as follows:

Re: Delays

- When discussing a requested extension to respond, Transportation was reminded that the file was expedited and that the issue of delay could form part of the Review Report, Transportation's FOIPOP Administrator pointed out "you might want to expedite it, but there are other people who were here first," and s/he needs to address their files too.

On December 14, 2010, Transportation provided some information in a telephone conversation, which I have summarized as follows:

Re: Delays

- When discussing overdue responses, even though the Review Office altered the deadline to accommodate the latest due date, Transportation's FOIPOP Administrator stated that s/he didn't realize that s/he would not get extra time to respond if s/he agreed to process all Reviews at once. The FOIPOP Administrator repeated that s/he thought s/he would have more than 15 days if s/he agreed process all of the files at once. The Review Office made it clear to him/her that we did not seek agreement with respect to collapsing all the of the Requests for Review. Given that the records sought were the same in all four but for different periods of time, the decision to process all related files as one Review was solely a decision of the Review Office. It was also brought to the attention of Transportation that this was also to provide him/her with a time saving as Transportation was only required to provide one Representation instead of four separate ones.

On May 17, 2011, Transportation provided a well-organized final Representation. Each of the issues is addressed. Below is the information relevant to one of the priorities issues identified to Transportation:

Re: Public Interest

- *I do not feel that the public interest in the matter overrides the applicable exemptions.*
- *[Transportation] has provided two Open-House information session[s] in order to provide the public with information regarding the [community name] Road Interchange, connector and [provincial highway], as well, as providing opportunity for the public to voice their opinions and or ask questions.*
- *[Transportation] has provided access to as much information as possible in order that the Applicant would clearly view the decisions of the department in their decision-making regarding this project.*
- *If the Applicant distributed to the public the information in an informative way as [s/he] claimed the reason for requesting this information then the public's interest should be satisfied.*
- *The matter only became a subject of public debate once the request was made, then a number of websites and newspaper articles were started by the Applicant.*

ISSUES UNDER REVIEW

Primary Issues:

Whether the Transportation appropriately applied the *Act* and, in particular:

1. Whether the public interest provision overrides all of the other exemption(s) claimed by Transportation.
2. Whether Transportation has caused inordinate delay. Whether the adequacy of the search for the Record has contributed to the delay. Whether Transportation's failure to meet its statutory duty to assist has contributed to the delay.
3. Whether "not responsive" can be used as an exemption.

Secondary Issues:

The following are issues that arose because of the exemptions claimed in Transportation's decisions, but which the Review Officer did not need to make Findings and Recommendations in order to dispose of the Review:

1. If the information withheld under s. 12 of the *Act* were to be disclosed, whether the conduct of intergovernmental relations between the Government of Nova Scotia and a municipal unit would be harmed.
2. Whether the information withheld under s. 14 of the *Act* fits the definition of advice or recommendations.
3. If the information withheld under s. 17 of the *Act* were to be disclosed, whether the government would suffer financial or economic harm.
4. Whether the information withheld under s. 20 of the *Act* fits the definition of personal information. Whether the disclosure be would an unreasonable invasion of privacy. Whether s. 20(4) of the *Act* applies.
5. Whether the three-part test applies to the information withheld under s. 21 of the *Act*.
6. Where it has been determined that a discretionary exemption applies, whether Transportation has properly exercised its discretion to apply it.

The Secondary Issues will be discussed in a Post-Script that follows the Findings and Recommendations section of this Review Report.

DISCUSSION

The *Act* identifies its purpose as follows:

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,***

. . .

iii. ***specifying limited exceptions to the rights of access,***

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

ii. facilitate informed public participation in policy formulation,
iii. ensure fairness in government decision-making,
iv. permit the airing and reconciliation of divergent views.
[Emphasis added]

This Review amplifies the purpose of the *Act.* The Applicant represents the Residents' Group interested in an issue of major importance to their community referring to itself as Protect the Bay. The Applications for Access to a Record were their attempt to have as much information as possible in order to maximize their participation in a government decision impacting their community.

As this Review is expedited, only the two critical issues needed to dispose of this matter will be discussed in detail. The Review Officer was encouraged years ago by a Legislative Committee to provide full and detailed reasons in Review Reports for educational value. Although I can find little evidence that the expanded Review Reports are having their desired effect, one can hope for that eventuality in the future. In order to add to the educational value of this Report, I have added a Post-Script to the Review Report to highlight the exemptions that were claimed but which do not apply in this case because of the public interest override.

PRIMARY ISSUE #1: WHETHER THE PUBLIC INTEREST PROVISION OVERRIDES ALL OF THE OTHER EXEMPTIONS CLAIMED BY TRANSPORTATION

Section 31 of the *Act* enables a public body to release information it considers in the public interest regardless of whether or not it has received an Application for Access to a Record. This public interest provision applies regardless of whether or not any exemption, discretionary or mandatory, could be applied to withhold the information. Section 31 reads as follows:

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.

(2) Before disclosing information pursuant to subsection (1), the head of a public body shall, if practicable, notify any third party to whom the information relates.
(3) Where it is not practicable to comply with subsection (2), the head of the public body shall mail a notice of disclosure in the prescribed form to the last known address of the third party.
(4) This Section applies notwithstanding any other provision of this Act.
[Emphasis added]

Understandably, public interest is not defined in the interpretation section of the *Act* as to do so could be fraught with difficulty.

> *"Public interest" is not defined in the Act. I agree with the Information and Privacy Commissioner of British Columbia who believes that "(a)ny attempt to define exhaustively or finally what is meant by the term 'public interest' is doomed to failure" (Order # 332-1999).*
> *[FI-02-20]*

In *FI-08-107,* I quoted from a recent Supreme Court of Canada case that agreed in principle that public interest is not synonymous with what interests the public but rather an issue which the public may have substantial concern as follows:

> *[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.***
>
> *[103]The authorities offer no single "test" for public interest, nor a static list of topics falling within the public interest (see, e.g. Gatley on Libel and Slander (11th ed. 2008), at p. 530). Guidance, however, may be found in the cases on fair comment and s. 2(b) of the Charter.*
>
> *[104]In London Artists, Ltd. v. Littler, [1969] 2 All E.R. 193 (C.A.), speaking of the defence of fair comment, Lord Denning M.R. described public interest broadly in terms of matters that may legitimately concern or interest people:*
>
> > *There is no definition in the books as to what is a matter of public interest. All we are given is a list of examples, coupled with the statement that it is for the judge and not for the jury. I would not myself confine it within narrow limits.* ***Whenever a matter is such as to affect people at large, so that they may be legitimately interested in, or concerned at, what is going on; or what may happen to them or to others; then it is a matter of public interest on which everyone is entitled to make fair comment.*** *[p. 198]*
>
> ***[Emphasis added]***
> *[Grant v. Torstar Corp., 2009 SCC 61]*

Several months after the Request for Review was received, the Applicant requested the Review be expedited. Prior to that the Applicant had requested a fee waiver to which

Transportation had agreed on the basis of public interest. Part of that decision is reproduced for emphasis:

> *We have reviewed this request and have decided to grant you a fee waiver on the basis that the matter is currently a subject of public debate, that [it] does have environmental implications and that it is in the public interest. As per in accordance with subsection 11(7)(b) the record relates to a matter of public interest, including the environment or public health or safety. Therefore, a fee waive[r] in the public interest is granted. [Emphasis in the original]*

Based on a submission by the Applicant, I decided to expedite the Review for the same reason as Transportation waived the fees. The Applicant and the Residents' Group s/he represents made out a case that there was considerable public interest in having the Review processed in a timely manner and in obtaining access to the Record with respect to a matter impacting their community. Both Transportation and the Review Officer made a determination that this Review fell within the realm of public interest.

While Transportation clearly considered it was in the public interest to waive fees, it did not apply that same principle in its decision to release the Record. Some authorities mistakenly think that they first need to determine if any exemptions apply and only then, if they are found to fit, ask whether there is a need for reliance on the public interest override. I consider this a convoluted way of interpreting an Application for Access to a Record such as in this case. Transportation had already made a determination about public interest with respect to waiving the substantial fees. In this case, Transportation chose to waive all processing fees associated with all four Applications for Access to a Record. The fact that the matter is currently the subject of public debate and that it does have an environmental, public health or safety implications resulted in Transportation deciding it is a matter in the public interest.

On that basis, in making its access to information decision, Transportation's first question should have been whether s. 31 of the *Act* should be applied in this case. This is appropriate in circumstances where release is a necessary precondition to meaningful expression and engagement, a right that has some constitutional protection. In cases such as this Review, involving a Residents' Group interest in a potential environmental, public health or safety issue, the public interest must override *[See Ontario (Public Safety and Security) v. Criminal Lawyers' Association, 2010 SCC 23]*.

Even if Transportation had not already acknowledged the public interest, it should have asked the following list of questions to determine if public interest is applicable:

> *Has the matter been a subject of recent public debate?*
> *Would dissemination of the information yield a public benefit by assisting public understanding of an important policy, law or service?*
> *Do the records show how the public body is allocating financial or other resources?*

> *If it is agreed that the matter is one of public interest, other factors to be considered are:*

Is the Applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public or to serve a private interest?
Is the Applicant able to disseminate the information to the public?
[FI-00-29]

Transportation should have continued to apply the principle of public interest it applied to the fee waiver to its subsequent decisions, considering how the public interest exemption applies to the Record as a whole, save and except for any reference to third party personal information, which the Applicant has been clear s/he does not want.

I agree with Transportation's decision to waive the fees based on public interest. I find that the public interest in s. 31 of the *Act* is paramount and applies to the entire Record except for personal information of third parties. I based this Finding on Transportation's decision to waive the fees in the public interest and for the following reasons:

- The information in the Record involves public health, safety and the environment;
- The disclosure of the information contained in the Record to the Applicant on behalf of the Residents' Group Protect the Bay is clearly in the public interest;
- The matter has been the subject of recent debate; the Applicant has a website dedicated to this matter and is in a position to disseminate the information to the Residents' Group and the public at large to their benefit; and
- The matter involves expenditure of public funds.

I want to make one final point regarding public interest. Transportation argued that a well-attended public meeting referred to as an Open House was evidence that public engagement somehow displaced the Applicant's right to access the Record under the statute. It is true that the public meeting attendance of 250 people is clear evidence of public interest. I appreciate Transportation making that point clear. It is not justification, however, to withhold the Record. The Applicant's right to access information is a distinct statutory right that can only be restricted based on the limited and specific exemptions under the *Act* and cannot be replaced by other steps taken by the public body to consult or engage the public.

PRIMARY ISSUE #2: WHETHER TRANSPORTATION CAUSED INORDINATE DELAY. WHETHER THE ADEQUACY OF THE SEARCH FOR THE RECORDS CONTRIBUTED TO THE DELAY. WHETHER TRANSPORTATION'S FAILURE TO MEET ITS STATUTORY DUTY TO ASSIST CONTRIBUTED TO THE DELAY

By way of introduction to this second primary issue, I want to make a preliminary comment. Details will be provided below but it is important to put this issue into context at the outset. Discussing process issues such as timing, search and duty to assist may seem trivial matters of procedure to some. As I will discuss below, this discussion is key is because very early on after the decision with respect to the Application for Access to a Record, Transportation made a very clear decision that waiving the fees was in the public interest. Shortly thereafter, I expedited the Review for the exact same reason. Where a matter is of public interest and is expedited, public bodies must make every effort to engage in the process to acknowledge that timing is critical to give real meaning to what is in the public interest. Justice delayed in access

to information requests, particularly one falling within the public interest override, can truly be justice denied thus defeating the whole purpose of the statute.

In August 2010, the Applicant requested that the Review Officer expedite the Reviews as it was anticipated that a decision might be made in the fall of 2010 about the matters identified in his/her Form 1 Application for Access to a Record. The Review Officer made a decision to expedite. The Applicant was warned that while the Review Officer had decided to expedite, the consolidated Reviews would still need to be processed through all the stages of the Review process and there was no guarantee the Reviews would be completed prior to the government making its decision.

There is little doubt that these consecutive Applications for Access to a Record and companion Requests for Review presented challenges for Transportation to process. The four Requests for Review were collapsed into one as they involved the same Application for Access to a Record but for different periods of time. This was done to assist both Transportation and the Review Office in avoiding duplication of effort and to allow the process to move along in a timely fashion.

Two factors appear to have contributed to delay during the Review. The first factor is the adequacy of the search conducted by Transportation for the Records. The Review Office identified this issue during the course of the Review, as it appeared that not all attachments were included during the compiling of the Record. The Applicant would not have been in a position to identify this because in most cases, the pages were either severed in full or the reference to the attachment was severed. Adequacy of search is part of a public body's duty to assist. This is closely tied to the issue of open, accurate and complete decision letters discussed below. If an applicant is not aware of what has been withheld and why, s/he will not know what may be missing. Where it was not clear what had been identified as responsive and what had not, the Review Officer has stated in a previous Review that:

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

In this Review, the following search particulars were raised with Transportation with respect to specific documents:

- Point to where a specific document is found in the package.
- Do a search and if a document is found, process it for disclosure to the Applicant with a copy to the Review Office
- Where no record can be found, confirm this with the Review Office.

The issue of search was partially resolved. Most of the specific documents identified to Transportation have now been provided or "pointed to", however there continues to be two outstanding attachments. In addition, Transportation has informed the Review Office that one of the documents had not been provided to the FOIPOP Administrator as part of the collection process – Transportation has confirmed that the attachment was a draft copy of a document that the Applicant did receive. Although specific documents have now been found, where the matter has not been adequately resolved it brings the entire search into question. This is a very similar situation to that found in a previous Review where I stated:

> *I am left with doubts as to the adequacy of the search even at the conclusion of this Review process. The discrepancies are so many and so complex it is difficult to understand if the problem is adequate search, poor records management or poor handling of the access to information process.*
> *[FI-07-60]*

When the Review moved to formal Review, Transportation was asked to answer the following questions so I could make a determination of whether or not an adequate search had been conducted:

- *Were records in any form or format considered (i.e. electronic, paper, other)?*
- *Is the original Application for Access to a Record very broad and could include information developed over a wide open time period? If so, how did you define the search?*
- *How did you search for the records in the public body's possession?*

    - *Did you search yourself?*
    - *Did you delegate others to do the search? If so, how can you be sure that the search was comprehensive?*
    - *Did you send out an email to other units, etc?*

- *Could records also exist that are responsive to this Application for Access to a Record that are not in your possession, but in your control?*

    - *Did agents, consultants or other contracted services have any role in the project the Application for Access to a Record is referencing?*
    - *If yes, are these records included in the package provided to the Review Office?*

Adequate responses to these questions were not provided by Transportation. I find that the back and forth trying to pin down the exact parameters and content of the Record contributed to the delay. Further, I find that Transportation essentially ignored my decision to expedite the Review and caused delay by choosing to exceed the time allotments given to public bodies. On a

thorough review of the entire process, I find the resulting delays were unnecessary and inappropriate in these circumstances.

I have a comment with respect to preparing the Record for the Applicant. Transportation may have over-complicated the preparation of the Record by extracting information provided by the Applicant. Although the Applicant is not interested in pursuing the severed information in the Record that is correspondence to Transportation from him/her in an attempt to assist to focus the Review, this should not have been necessary.

In this case, there are portions of the Record that were provided by the Applicant. In order to maximize the accuracy and completeness of the Record, Transportation should not have removed these portions thus ensuring the integrity of the Record as a whole. To interfere with the integrity of the Record as a whole entity is unnecessarily discombobulating. That is because severing such information leads to an "absurd result." I had the opportunity to consider the idea of absurd result in *FI-07-72* where I relied on *Ontario Order PO-2582*, which stated:

> *Where the requester originally supplied the information, or the requester is otherwise aware of it, the information may be found not exempt under section 49(b), because to find otherwise would be absurd and inconsistent with the purpose of the exemption [Orders M-444, MO-1323]*.
>
> *The absurd result principle has been applied where, for example:*
>
> - *the requester sought access to his or her own witness statement [Orders M-444, M-451]*
> - *the requester was present when the information was provided to the institution [Orders M-444, P-1414]*
> - *the information is clearly within the requester's knowledge [Orders MO-1196, PO-1679, MO-1755]*

The burden of proof is with Transportation to show that the part of the Record supplied by the Applicant should be severed. Transportation has not met that burden. Leaving this part of the Record intact would have left the Applicant with a more accurate and complete version of the Record and would have saved Transportation time processing the file for disclosure. Transportation's duty in this regard will be discussed below.

With respect to third party personal information, the Applicant has been clear that s/he was not interested in that information but where s/he originally supplied it, it would be absurd to sever it.

The second factor contributing to delay is whether Transportation met its statutory duty to assist the Applicant. As part of a public body's duty to assist, s. 7 of the *Act* requires that a public body's decision letter an applicant is open, accurate and complete, including providing reasons for the refusal to provide all or part of a record. This means that it is not sufficient for a public body to simply quote the sections of statute that contain the exemptions.

In *FI-06-71(M)*, I addressed this requirement by stating:

It is important at the outset to emphasize the importance of the completeness of the initial correspondence between a public body and an Applicant. In this case, where a substantial portion of the record was denied to the Applicant, it was incumbent for the Police to provide full and adequate reasons for the refusal. I rely on McCormack v. Nova Scotia (Attorney General) (1993), Can Lll 3401 (NSSC), at para. 3 where Justice Edwards stated:

> *"Upon receiving a request the Minister should be mindful that the purpose of the Act is to provide for the disclosure of all Government information with necessary exemptions that are limited and specific (s. 2). The Act creates a right of access to information (s. 4(1)). The Minister ought to keep in mind that disclosure can only be refused if the requested information fits squarely within one of the exemptions in the Act.*
>
> *Secondly, when the Minister determines that an exemption applies, she should tell the applicant that she has read (or been briefed upon) the requested information and, insofar as possible,* ***should detail for the applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough." [Emphasis added]***

In the case at hand, the Police failed to provide any reasons and simply listed sections of the statute to justify the severed parts of the record. The Applicant's request was very specific in seeking access to his personal information, specifically naming the individuals he did not want information about. The onus rests with the public body in such cases to justify reliance on one of the statutory exemptions. Giving details to the Applicant is particularly important in such cases so as to enable him to understand how the circumstances of his case fall within the parameters of one of the exemptions.

In order to gather information from Transportation on how the exemptions apply and how discretion was exercised, the Review Office requested Representations. The Representations were originally due on November 3, 2010, which was extended until December 20, 2010. When the Representations still had not been received the Review Office met with Transportation. The due date was continually extended until March 16, 2011. When the Representations were received on that date they were 133 days overdue. To be clear, this information was requested because Transportation had failed to provide reasons in its decision letter and the Review Office had no information with which to investigate the issues under Review. This means that the

Review Office had to wait 133 days (plus the 15 originally given) to get any of the information needed to fulfil our statutory obligations to conduct a Review.

Public bodies must be sensitive to the need to respond in a manner that is, from the time of receiving the Application for Access to a Record and throughout the process until the conclusion of a Request for Review, consistently open, accurate and complete. The Review Office met with Transportation in an effort to assist. The Representations remained outstanding after that meeting for another two months.

In Application for Access to a Records everyone including the Review Office needs to be diligent about timeliness and try to be as responsive as possible over the course of a review file being processed even where there are no statutory timelines. Where public bodies are unable to provide responses in a timely fashion they should try to provide an explanation to the Review Office so Applicants can be kept apprised. This is especially true when considerable research was provided by the Review Office and the explanation received from Community Services after canvassing the experts was extremely simplistic and it appears that there was no effort on the part of Community Services to release more of the Record to the Applicant.
[FI-07-59]

This means responding in a manner that assists an applicant with his/her request in a timely fashion. To do otherwise, particularly in an expedited file, leaves the public body open to suspicion, which may or may not be a fair accusation.

The timing may be circumstantial but my observation is that as a result of the delay the Applicants' right to access information and to fully participate in policy formulation, government decision-making and being allowed to air divergent views, was interfered with and at odds with the purposes of the Act.

Finally, I find that in any Review but particularly in an expedited Review all parties and the Review Office should make every effort to avoid unnecessary delay. That was not achieved in this Review.
[FI-10-49/FI-10-51]

I find that Transportation caused inordinate delay in this Review. Contributing factors to that delay were inadequate search and failure to meet its statutory duty to assist including failing to provide an open, accurate and decisions to the Applicant.

PRIMARY ISSUE #3: WHETHER "NOT RESPONSIVE" CAN BE USED AS AN EXEMPTION

Many portions of the Record are withheld with an "N/R" reference, claiming that the portion of the record is "not responsive" to the scope of the Application for Access to a Record. The Applicant's Application for Access to a Record was for "any and all information and documents related to [community name] Interchange Structure, Ramps and Connector to [provincial highway]" and goes on to identify (but not limit) the request for information to specific types of documents. This means that any record that concerns the project in any way would be responsive.

The *Act* gives a right to access a record; it does not limit it to information. Section 5(2) of the *Act* allows for severing a record where it permits a public body to deny access to "information exempted from disclosure pursuant to this Act." The exemptions are clearly expressed and provided their own distinct section of the *Act* at sections 12 through 21 inclusive. Thus, it would seem that, once a page is deemed to be responsive to an applicant's Application for Access to a Record, the entire page is responsive, unless certain exemptions apply. The

purpose section of the *Act* states clearly that accountability, in part, rests on *specifying limited exceptions to the rights of access [Refer to s. 2(a)(iii)]*.

In *FI-07-59* I touched upon the use of "not responsive" as a severance. I found that:

> *Community Services takes the position that the portion of the Manual that uses fictitious names on sample forms should not be provided to the Applicant because that information is "not responsive" to the Application for Access to a Record. Community Services provided the entire Policy Manual to the Review Office, which is exactly what the Applicant requested. The Policy Manual is in its entirety, responsive to the Applicant's request.*
>
> > *In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.*
> > *[ON Order P-880]*
>
> *To claim that fictitious names in a manual are "not responsive" has no basis or validity under the Act. If Community Services thought the Applicant would be confused by the use of these names, which would itself be surprising because it is clear in the Record they are for sample purposes only, under their duty to assist, Community Services should have provided him/her with an explanation about the use of fictitious names. With all due respect, for Community Services to use this argument as a basis to deny access to a portion of a Policy Manual trivializes the purposes underlying the Act.*

In some instances, Transportation has withheld information related to other projects. The Applicant is not interested in other projects. That information may in fact not relate to what the Applicant has requested but it is found within the Record that is responsive to the Applicant's Application for Access to a Record. At the very least, rather than simply marking part of the Record "not responsive", Transportation could have explained the redactions to the Applicant pursuant to its duty to assist. If the portion of the Record related to another project and was "not responsive" to the Application for Access to a Record, Transportation could have explained that in its decision letter. In order for the Review Officer to entertain the use of "NR" as a reason to redact the Record, Transportation must clearly show how this information is "not responsive" to the Form 1 Application for Access to a Record.

That being said, I find there are strings of emails that were severed and that clearly do not fit this description. Transportation made a decision with respect to the Record that it considered responsive to the Applicant's Application for Access to a Record. Based on its decision to rely on certain exemptions, Transportation redacted that Record. When a Request for Review was

filed with our Office, Transportation sent a complete unsevered copy of the Record to the Review Office as required. It was surprising to see so much of the Record marked as "not responsive". A record is responsive or it is not. Once a record has been compiled as the package responsive to the Application for Access to a Record, it would be nonsensical if a public body then turned around and said portions were "not responsive". This is inconsistent with what the statute requires a public body to do in response to a request and principles of records management. If there are portions that are truly "not responsive" to the Application for Access to a Record then the public body should organize the documents in advance of making its decision based on a record that responds solely to the Application for Access to a Record.

I find that "not responsive" cannot be used as if it were an exemption to try and withhold information that does not fit within any of the exemptions simply because the public body does not want to release it, and that Transportation's use of "not responsive" is wholly inappropriate and not permitted under the Nova Scotia legislation. Citizens have a right to access a record. I find that "not responsive" has been used by Transportation to shelter access to parts of the Record that are in fact responsive and do not fall under any exemption claimed. Inappropriate comments, marginally relevant or incorrect information, and information provided by the Applicant, are not reasons to withhold information as "not responsive". I also want to make it clear that Nova Scotians enjoy a right to a record, not just information. That means providing a response to an Application for Access to a Record that is *open, accurate and complete [See s. 7 of the Act]*.

It is worth noting that by severing information deemed "not responsive", Transportation further delayed the processing of the Record for disclosure and the Review process. By severing information that related to other projects and where an exemption would not apply, it took up valuable time manually removing the entries but then took more time having to explain why. If Transportation had just left the information in the Record, time would have been saved and the apprehension of suspicion would have decreased.

Transportation claimed multiple exemptions, which are briefly referred to herein. By merely citing the sections containing the exemptions or referring to parts of the Record as "not responsive", Transportation failed in three critical respects. It failed to provide sufficient information to demonstrate how the particular exemption applied to the portion of the Record in order to justify withholding it. It also failed to give reasons to the Applicant how it exercised its discretion to withhold information even where the exemption was discretionary. In its Representations, Transportation provided an explanation about what the exemptions meant but did not provide evidence as to how they applied to the Record. Finally, Transportation failed because it applied "not responsive" as if it were an exemption.

I want to be clear at this point, I find that Transportation has not demonstrated how any of the exemptions apply and thus it is unnecessary to discuss if Transportation provided ample explanation as to how it exercised its discretion to withhold information. A public body must first show that an exemption applies and if it fails to do so, the issue of exercise of discretion is moot.

FINDINGS

1. I agree with Transportation's decision to waive the fees based on public interest.
2. I find that the public interest in s. 31 of the *Act* is paramount and applies to the entire Record except for personal information of third parties.
3. I find that Transportation caused inordinate delay in this Review.
4. I find that the back and forth trying to pin down the exact parameters and content of the Record contributed to the delay.
5. I find that Transportation essentially ignored my decision to expedite the Review and caused delay by choosing to exceed the time allotments given to public bodies.
6. I find the resulting delays were unnecessary and inappropriate.
7. I find that "not responsive" cannot be used as if it were an exemption to withhold information that does not fit within any of the exemptions simply because the public body does not want to release it.
8. I find there are strings of emails identified as "not responsive" but clearly do not fit this description.
9. I find that Transportation's use of "not responsive" is wholly inappropriate and not permitted under the Nova Scotia legislation. Citizens have a right to access a Record.
10. I find that "not responsive" has been used by Transportation to shelter access to parts of the Record that are in fact responsive and do not fall under any exemption claimed.

RECOMMENDATIONS

I make the following Recommendations to Transportation:

1. Disclose the remainder of the Record, the portion previously withheld under a number of exemptions, with only third party personal information severed, because disclosure is clearly in the public interest. This would include any portion that relates to other projects as it has been identified as part of the responsive Record by Transportation.

2. In future Reviews, Transportation should make every effort to comply with any term or condition imposed by the Review Officer including the condition to expedite a Review.

Respectfully,

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

POST-SCRIPT: DISCUSSION WITH RESPECT TO SECONDARY ISSUES

The following discussion largely comes from the Investigation Summary provided to the parties during the Review process. I have chosen to include some of it as a Post-Script to the Review Report to highlight the exemptions that were claimed but which do not apply in this case because of the public interest override. This discussion may assist Transportation, and other public bodies, in future cases where these exemptions may be applicable.

SECONDARY ISSUE #1: WHETHER DISCLOSURE UNDER S. 12 OF THE ACT WOULD RESULT IN HARM TO INTERGOVERNMENTAL RELATIONS

Subsection 12(1)(a) of the *Act* is intended to protect the relations/relationship between two levels of government, in this case a municipal unit. The harm must come from the disclosure of the content of the record, not the decision to disclose *[See Alberta Order F2008-032]*.

The burden of proof rests with Transportation to identify the harm that could reasonably be expected to the conduct by the Government of Nova Scotia of relations between the Government and a municipal government. Transportation did not provide any evidence of any resulting harm from the disclosure. Transportation provided so few details that it did not even identify the other level of government. In the future, if a public body believes identifying the other public body may in and of itself add to the harm, it is open to the public body request an in-camera Representation.

SECONDARY ISSUE #2: WHETHER INFORMATION WITHHELD UNDER SECTION 14 OF THE ACT FITS WITHIN DEFINITION OF ADVICE OR RECOMMENDATIONS

The purpose of this exemption is to protect the open and frank discussion of policy issues and the internal decision-making in public bodies, free from interference, harassment and second-guessing. It recognizes that there must be candid discussions, deliberations and the like so as not to impair the workings of public bodies, which is necessary for effective government.

In order for the exemption to fit, the information must fit the definition of advice or recommendations - the information must lead to a course of action. The burden of proof is on Transportation to first identify whether the Record contains advice or a recommendation and second show how each piece of information withheld fits the definition of advice or recommendation. Third Transportation must establish that the advice was sought or expected and that it was directed at someone who could do something with it as part of a deliberative process. The Supreme Court of Nova Scotia has stated:

> *[27] In O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat), supra, MacDonald, A.C.J. of the Nova Scotia Supreme Court, sitting as a Chambers Judge considered the meaning of "advice" in interpreting s.13(1).*
>
> *[28] The Chambers Judge concluded that 'advice is part of the deliberative process', and accepted the views of Commissioner Linden, the Ontario Commissioner in Order 118*

that 'advice' generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process. [R. v. Fuller, 2003 NSSC 58]

The exemption cannot be applied to any of the information/document types listed in s. 3(1)(a) of the *Act*, which is considered background information. Transportation stated that as part of its decision that the background information was severed because it was inaccurate. Inaccurate information will not impact on the decision to release or not *[See FI-04-50]*.

If the information does not fit the definition of advice or recommendation, the exemption cannot be applied. In the most recent Review Report *FI-10-49/FI-10-51*, the public body failed to demonstrate how the information fit the definition of advice. The result was that the Review Officer found that the exemption did not apply and that the Record should be released as background information.

SECONDARY ISSUE #3: WHETHER DISCLOSURE OF THE INFORMATION WITHHELD UNDER SECTION 17 OF THE ACT COULD REASONABLY BE EXPECTED TO HARM THE FINANCIAL OR ECONOMIC INTERESTS OF GOVERNMENT

This exemption recognizes the need to protect certain economic interests of public bodies. This was discussed in an Ontario Report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) which explains the rationale for including a "valuable government information" exemption in their *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

The first part of the test of this exemption to fit is the element of harm. If disclosure of the information in the Record could "reasonably be expected to harm" the government financially, then this exemption could apply. The test *requires a confident and objective evidentiary basis* and *there must also be a clear and direct connection between the disclosure of specific information and the harm [See BC Order F08-22]*.

The content being disclosed must cause the harm - not the act of disclosing. The exemption lists examples of the types of information that may qualify for exemption. In this case, Transportation has relied on four of the subsections – a, b, c and d.

It is the specific information itself that must be capable of causing the harm if it is disclosed. Transportation must provide evidence to the Review Office to establish the link between the disclosure of the information and the expected harm. The burden of proof rests with Transportation to provide evidence:

1. to show what the harm is;
2. to show the connection of that harm to the disclosure, and
3. identify:

   (a) how the information is a government "trade secret" (as defined in s. 3(1)(m) of the *Act*);
   (b) how it "belongs" to government and what is the monetary value;
   (c) how it is a plan that has not yet been implemented and the expected implementation date;
   (d) how it would prematurely disclose a project or how it would cause undue financial loss or gain and to whom.

Several cases have listed the kinds of harm that are demonstrable *[For example see AB Order F2008-032]*.

SECONDARY ISSUE #4: WHETHER THE INFORMATION FALLS WITHIN THE DEFINITION OF PERSONAL INFORMATION UNDER SECTION 20 OF THE ACT AND WOULD DISCLOSURE CONSTITUTE AN UNREASONABLE INVASION OF PRIVACY

This is a mandatory exemption. Once it is determined that the Record contains personal information of a third party, the information must be evaluated to assess whether or not its disclosure would be an unreasonable invasion of that third party's privacy. In the present Review, the Applicant has made it patently clear that s/he is not interested in pursuing the personal information of third parties in the Record, which consists of names, addresses and email addresses of other landowners.

SECONDARY ISSUE #5: WHETHER THE INFORMATION WITHHELD UNDER SECTION 21 OF THE ACT MEETS THE BUSINESS INFORMATION EXEMPTION THREE-PART TEST

In *FI-08-39*, the Review Officer states "Section 21 is designed to protect the "informational assets" of businesses or other organizations that provide information to the public body."

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

1. Which subsection of "part (a)" is applicable?
2. How does the information fit the definition? If (i):

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

If (ii):

a. How does the information "belong" to the business?

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

The burden of proof rests with Transportation to prove the exemption fits by addressing all of the questions above. Transportation has not provided any information on how this exemption fits and in its decision has only claimed two of the three parts as being applicable; therefore, the exemption cannot fit. In order for the burden to be met, Transportation needed to prove all three parts in s. 21 of the *Act* apply, as the parts are to be read conjunctively.

SECONDARY ISSUE # 6: IF IT HAS BEEN SHOWN THAT A DISCRETIONARY EXEMPTION APPLIES, WHETHER TRANSPORTATION PROPERLY EXERCISED ITS DISCRETION

It is important to remember with any discretionary exemption such as those relied on in this Review including ss. 12, 14, 17 of the *Act* that it remains open to the public body to choose not to apply the exemption and release the information. This is achieved through the exercise of discretion. In fact, that is what it means to have a discretionary exemption. Too often, as in this Review, a public body will simply cite the discretionary exemption and apply it as if it were a mandatory exemption. That is not appropriate or sufficient.

In *FI-06-79,* I wrote at length on the exercise of discretion, emphasizing to public bodies the importance of considering all relevant factors. A non-exhaustive list of factors for public bodies to consider is taken from *BC Order 325-1999:*

> *In exercising discretion, the head considers all relevant factors affecting the particular case, including:*
>
> - *the general purposes of the legislation: public bodies should make information available to the public; individuals should have access to personal information about themselves;*
> - *the wording of the discretionary exception and the interests which the section attempts to balance;*
> - *whether the individual's request could be satisfied by severing the record and by providing the applicant with as much information as is reasonably practicable;*

- *the historical practice of the public body with respect to the release of similar types of documents;*
- *the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
- *whether the disclosure of the information will increase public confidence in the operation of the public body;*
- *the age of the record;*
- *whether there is a sympathetic or compelling need to release materials;*
- *whether previous orders of the Commissioner have ruled that similar types of records or information should or should not be subject to disclosure; and*
- *when the policy advice exception is claimed, whether the decision to which the advice or recommendations relates has already been made.*

The following questions may also be considered:

- How would disclosure of the Record affect the decision-making process of government?
- Is the information sensitive?
- Is public interest a factor?

Where the exemption is found to fit, but in the absence of evidence of how discretion was exercised or if I believe it should have been exercised differently, I may find that the exemption should not have been applied. For each of the exemptions claimed, Transportation must outline what factors it has considered in order to exercise discretion to apply the exemption not simply explain what the exemption means.