



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of the Review Officer
Dulcie McCallum
FI-11-34(M)**

Report Release Date: July 27, 2011

Public Body: Halifax Regional Police

Issue: Whether the Halifax Regional Police [“HRP”] is in contravention of the *Part XX* of the *Municipal Government Act* [“*MGA*”] and in particular:

1. By refusing to provide the Review Officer with the Record as required by s. 491 of the *MGA*.
2. By basing its refusal to provide the Record to the Review Officer on a decision under s. 463(2)(f) of the *MGA* when in fact there is only an ongoing investigation and no prosecution.
3. By failing to provide the Review Officer with any evidence to support its claim that the Record relates to an ongoing prosecution.

Record at Issue: No Record has been provided to the Review Officer by the HRP.

Summary: The Applicant made an Application for Access to a Record in March 2011. The HRP made a decision under the *MGA* exercising its discretion to refuse the Record representing that disclosure could reasonably be expected to harm the effectiveness of investigative techniques or procedures currently used in law enforcement. The Applicant made a Request for a Review. For the three months following the Request, the HRP delayed in providing a copy of the responsive Record to the Review Officer despite representations it intended to do so and despite repeated requests from the Review Office to do so. In July 2011 the HRP notified the Applicant of a new decision that the Record was excluded under the *MGA* because the requested Record is based on investigations and prosecutions and the matters are still proceeding and therefore the Record was not subject to disclosure to the Applicant or subject to the Review process. This Report deals solely with the issue of the statutory

obligation on the HRP to provide a copy of the responsive Record to the Review Officer.

Findings:

The Review Officer made the following findings with respect to the issue of the HRP's failure to provide the Review Officer with the Record:

1. I find that the HRP made a decision to the Applicant to withhold the Record relying on an *exemption* under s. 475(1)(c) of the *MGA*. By making a decision relying on an exemption and by advising the Applicant of his/her right to Request a Review of that decision to me as *the* Review Officer, the HRP attorned to my jurisdiction under the *MGA*.
2. When the Applicant filed a Request for Review of the HRP's decision, I find that I was under a statutory duty to conduct a Review and had no authority under the legislation to refuse.
3. I find that the HRP has failed to provide a copy of the responsive Record despite its representations it would do so and the Review Office's repeated requests for it to be provided.
4. I find that the HRP has not provided the Review Office with one scintilla of evidence of any pending or actual prosecution or any evidence that the Record relates to an ongoing prosecution, which is the statutory test for a Record to be excluded.
5. I find that s. 475 of the *MGA* provides the HRP ample opportunity to claim these discretionary law enforcement exemptions.
6. I find the HRP is attempting to use an ongoing investigation that may or may not result in a prosecution as a means of avoiding producing the responsive Record to the independent oversight Review Officer. By incorporating the language of investigations into its latest decision to the Applicant "the requested records are based on investigations and prosecution" the HRP cannot transform what is an investigation into something in respect of a prosecution in order to fall under s. 463(2)(f). To convert the exclusion provision with respect to prosecutions into something that can be used for an investigation would render the law enforcement exemptions under the *MGA* meaningless.
7. I find that it would be an absurd result if a public body was permitted to proceed in the manner in which the HRP has in this case: make a decision and claim an exemption under the *MGA*; advise the Applicant of his/her Right to Request a Review; indicate to the Review Office the Record was forthcoming and then do a complete about-face; change its decision and claim the Record is excluded.
8. I find that a public body's claim that a Record is excluded does not automatically exclude the statutory jurisdiction of the Review

Officer as the oversight body. In an instance, such as this, a public body's claim cannot be accepted at face value. Because the HRP has made misrepresentations to the Review Office and dramatically altered its decisions to the Applicant, the Review Officer is required to ensure the exclusion applies, in fact and in law.

9. I find the HRP is using an ongoing investigation that may or may not result in a prosecution as a means of avoiding producing the responsive Record to the independent oversight Review Officer.
10. I find the HRP's lack of cooperation and apparent lack of faith in how the Review Office would deal with a potentially highly sensitive Record, given our reputation for confidentiality, very disturbing.
11. I find that by making a decision under one of the law enforcement exemptions under the *MGA* and subsequently trying to excuse itself from producing the Record to the Review Officer because it claimed it no longer had custody of the Record and then making a new decision that the Record is excluded, the HRP has subjugated the whole purpose of the oversight provisions.
12. I find that it would be unconscionable to let the HRP's decision stand that characterizes an investigation Record as a Record related to a prosecution when there is not one scintilla of evidence of a prosecution.

Recommendations: The Review Officer made the following Recommendations:

1. The HRP provide the Review Office with a copy of the complete and accurate Record; and
2. The HRP provide the Review Office with evidence that there is an ongoing prosecution and evidence as to how the Record relates to a prosecution.

Key Words: abridged, attorned, absurd result, excluded, exclusion, exemption, investigation, jurisdiction, purpose, prosecution, Record, refusal, scintilla, unconscionable.

Statutes Considered: *Part XX of the Municipal Government Act, s. 462(a)(v), 463(2)(f), 475(1)(a), 475(1)(c), 476, 491, 501(2); Freedom of Information and Protection of Privacy Act s. 4(2) and Regulations s. 22.*

Case Authorities Cited: *NS Review Reports FI-05-47; O'Connor v. Nova Scotia (2001) NSCA 132; AG(ON) v. Toronto Star 2010 ONSC 991; Alberta Order 99-03; ON Order MO-2381; Alberta Order F2010-023.*

Other Cited: *NS FOIPOP Procedures Manual (2005).*

REVIEW REPORT FI-11-34(M)

BACKGROUND

On March 28, 2011 the HRP received the Applicant's Application for Access to a Record, which stated:

This is a request under section 20 of the Municipal Government Act, release of a description of the review regarding Halifax police officers involved in a private lie-detector company, carried out by the Bridgewater chief of police over the past year. Please indicate what aspect of the Police Act was referenced for the matter, and whether any findings were made and the nature of the findings. Please provide a copy (with names severed) of the complaint to the Complaints Commissioner which followed the results of the Bridgewater police chief's findings.

I am also seeking any documents that indicate departmental practices that may have caused or contributed to an alleged disciplinary default in this instance, and documents that indicate the chief officer's comments on organization or administrative matters that may need further consideration as a result of this incident.

In all instances, the applicant is not seeking the identity of those in question. Rather, it is requesting, in the public interest, a description of what occurred in this instance, and what the result of the investigation was in general. Please consider in replying the broader public interest in openness by the police force in its actions and decisions in regards to the outside work undertaken by its employees, taking into account this matter involves multiple police officers.

On March 30, 2011, the HRP provided its decision to the Application denying access based on an **exemption** pursuant to s. 475(1) of the MGA. The HRP stated:

We received your application for access under Part XX of the Municipal Government Act on March 28, 2011.

Please be advised we are unable to provide the information requested as this file still remains open and under investigation. Access to the record(s) is refused for the following reason:

"That the disclosure could reasonably be reasonably be expected to harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement pursuant to section 475(1)(c) of the MGA."

Enclosed is a copy of our HRP Standard Operational Policy governing Off Duty Employment.

You have the right to ask within 60 days of being notified of this decision, for a review of this decision by a [sic] Review Officer. If you wish to ask for a review, you must do so on Form 7, a copy of which is attached. This completed form would then be sent to : Freedom of Information Review Office [sic] [address].

On April 26, 2011 the Review Officer received a Request for Review from the Applicant on a Form 7 dated April 12, 2011 seeking a Review of the March 30, 2011 decision by the HRP. Representations intended by the Applicant to accompany the Form 7 were received on May 4, 2011.

On April 27, 2011 the Review Officer corresponded with the HRP and requested a “complete copy of the records sent to the Applicant” and “a complete copy of the records responsive to the application” to be forwarded within 15 days of receipt of the letter, in accordance with s. 22 of the *FOIPOP Regulations*. [Cross reference to s. 501(2) of the *MGA*]

On May 2, 2011 the HRP responded to the Review Office request for the Record and stated:

In response to your letter dated April 27, 2011.

Please be advised there are two files involving this investigation. One file is an internal file held under the Police Act presently before the Nova Scotia Police Commission Review Board. The second file is presently being investigated by an outside agency. Unfortunately these files are not in our possession, therefore, no information can be provided.

Please find the following information provided to the applicant.

Should you have any questions or concerns, please feel free to contact our office.

On May 12, 2011 after discussing the failure to provide the Record by telephone, Intake at the Review Office confirmed those discussions by email. The email stated:

- *You stated that there are two sets of responsive records, one is before the Police Complaints Commissioner and one is regarding an internal matter and is now with an outside agency who is investigating a possible law enforcement violation under the Criminal Code and charges have not been laid at this time.*
- *You stated that the HRP has control over the record with the Police Complaints Commissioner and will likely be able to recall a copy of that record and provide it to the Review Office.*
- *You stated that the HRP might not have control over the record that is with the outside agency conducting the investigation and you are unsure whether you will be given a copy of that record if you request it.*

- *The HRP is withholding both responsive records in full under s. 475 of the MGA.*
- *You did not review the responsive records before issuing your decision to the Applicant.*
- *You stated the Police Act requires this information to be kept confidential.*
- *I explained that Part XX of the MGA at s. 491 states that notwithstanding any Act or privilege that is available at law the Review Officer may require any record that is in the custody or control of the HRP to be produced.*
- *I explained that the responsive record would be records that existed as of the date of the Applicant's Application for Access to a Record to the HRP.*
- *You are concerned that the contents of the record with the outside agency could put the Review Office in a predicament although you did not specify what that may be.*
- *The HRP's position is that a provincial statute does not overrule the Criminal Code and therefore, the Review Officer does not have a right to a copy of this record.*
- *Regarding time lines, the Regulations require that the HRP provide a copy of the responsive records to the Review Officer within 15 days, so the HRP is already late with the responsive records.*

On the same day, the HRP responded to the email from the Review Office, in which the HRP stated:

I concur in general with the exception of the second last bullet:

The HRP's position is that a provincial statute does not overrule the Criminal Code and therefore, the Review Officer does not have a right to a copy of this record.

I was not stating this as a position, but as a question as to whether a provincial act can supercede [sic] or make requirements on a matter that is of a criminal nature pursuant to the Criminal Code. This was a discussion point and not a statement.

On May 12, 2011, Intake referred this matter to me because of the fact that the HRP was beyond the deadline to provide a copy of the responsive Record to the Review Office.

On May 20, 2011, I wrote to the FOIPOP Administrator at the HRP by email, as follows:

I am writing to you to try and sort out how we can best proceed with respect to two

Records that are outstanding with our office. What I understand has occurred to date is the following:

1. You received an Application for Access to a Record [#11-52] for two records. At the time you received the access request neither record was in your possession. One was with another police agency and the second one was with the Police Complaints Commissioner. As both records involved investigations of a kind you advised the Applicant, without reviewing the record, that the s. 475 exemption regarding investigations applied and you withheld the records.

2. A Request for a Review was received by our Office [FI-11-43(M)]. As you know under the statute we have no discretion to refuse to accept a Request for Review. We therefore must request a copy of the records at issue to ensure the exemption has been properly applied by the public body in its decision to withhold. The issue of our legislation trumping the Criminal Code is not relevant.

3. As I understand it, the Records were created and/or in the possession and control of HRP and subsequently shared with these other agencies for particular investigative purposes. While you may not have custody at this particular moment, you continue to have control over the Record in that they will be returned to you and you have an obligation to retain and destroy according to law.

The MGA Act Part XX compels me to obtain a copy of a Record and thus I propose the following in order to move this matter along:

- 1. You request a copy of your Record back [I assume you gave them the original] from the outside police agency. I do not want the original. I want a copy of the Record responsive to the Form 1. If they refuse please tell me that and I will deal with them directly.*
- 2. With respect to the Record you gave to the Police Complaints Commissioner, please request a copy from them and forward to this office.*

While both other polices agencies and the Police Complaints Commissioner fall under FOIPOP and understands this process, please make it clear to both agencies, we have nothing to do with their ongoing investigations or inquiries. Our role is to fulfill our statutory mandate and that requires that we review the Records and satisfy ourselves that your decision to the Applicant was in accordance with the legislation. As you know, neither the contents nor the Record itself are ever shared in any way whatsoever with an applicant or any person. This could also be made clear in your letter requesting a copy of the Records be returned to you.

On May 24, 2011 the HRP responded to me by email, which stated:

Thank you for your email,

I have requested copies of the two Police Act files [from an external investigative body]. They have secured the files as part of an ongoing criminal investigation.

The third investigation is a criminal investigation and in consultation with our legal department is considered privileged.

I will forward the Police Act files with our position on their release as soon as I receive a copy of them back from [an external investigative body].

Thank you

By email dated May 25, 2011 I confirmed with the HRP its advice with respect to providing part of the responsive Record, which stated:

Thank you for your voice message on Friday, I appreciated hearing from you.

I am glad you are able to make the request to [the external investigative body] to retrieve a copy of the two HRP police files they presently have. I look forward to receiving those from you.

With respect to the third file, which you indicate is a criminal consultation involving your legal department who indicates they consider it "privileged", there is no situation where privilege over a Record would enable a public body to refuse the Record to the Review Officer when we have a Request for Review that involves that Record. As you know, under s. 475(1)(c) [law enforcement] and s. 476 [solicitor-client privilege] of [Part XX] of the MGA are discretionary exemptions which you may choose to rely on in refusing access to the Applicant, but that does not override my statutory authority and obligation to review the Record to determine if the discretionary exemptions apply. As you know the Review Officer never discloses or releases any part of a Record to any person or party at any time and that is why the MGA requires that public bodies produce the responsive Record at all times to enable us to make findings and recommendations.

You made reference to a Record that was with the Police Complaints Commissioner. Is this the same as the one with your legal department or is there a fourth Record?

If you have any questions, please contact Mary Kennedy at Intake.

Please forward all responsive Records as soon as they are made available to you and no later than June 1, 2011. Your attention in this regard is appreciated.

On May 25, 2011 the HRP responded as follows:

Hello,

The file with the Police Complaint Commissioner would be the ongoing "trial" of that office. The hearings in that venue are "de novo", therefore there is a complete new set of testimony, that file and the contents is the file of the Commission and not ours. There is information there, but it is not ours per se.

On the criminal code side, I will get some more details, but I wanted to let you know that I have no issue with the completed criminal file, but the issue seems to relate to the ongoing criminal investigation. There was a case cited, but I do not have it here with me now.

I will speak to legal and get that for you.

I have received the files in electronic scanned version and will get a cover letter and forward to you asap.

As it did not follow through as proposed, the HRP was asked for clarification by email dated May 27, 2011, which stated:

Thank you for your email.

I am not clear on your response. I am only concerned with the responsive Record at the date of the Form 1. Any other later Record [de novo proceedings with the Police Complaints Commissioner] would not be responsive. I think you are saying that there is a responsive record that is with Police Complaints Commissioner but it is not in your custody [is that what not ours per se means?]. What matters is if it is in your control ie to recall a copy. You did not mention you not being able to obtain a copy of the Record to the Applicant in your decision letter, which you should have under your duty to assist. Equally important with respect to that duty, as it is your Record, if you are not able to recall from the Police Complaints Commissioner [if they refuse] your duty under the Act was to transfer the Applicant's request as they too are a public body under my legislation. You have not indicated to me any steps you have taken to try and obtain a copy of your Record back from the Commission.

I would request that you obtain and send a copy of that Record on or before June 1, 2011.

Regarding the case cited regarding an ongoing criminal investigation as it relates to not providing records to the Review Officer in the course of a Request for Review, please forward a copy of this case upon receipt of this email. While release of a Record to an Applicant may be delayed until a criminal investigation is complete, that has nothing to do with your responsibility to provide a copy of the responsive Record to the Review Officer in accordance with the Act.

I would request that you obtain and send a copy of that Record on or before June 1, 2011.

Further to the statutory duty to assist: I note with interest that you as the FOIPOP Administrator did not have the Record, look at the Record, review the Record, or make any attempt to obtain a copy of the Record, yet made a decision to apply a blanket exemption to withhold all parts of the responsive Record. At first glance, this seems to be a departure from best practice.

Now as the FOIPOP Administrator you are further delaying the Review process by refusing to provide the Review Officer a copy of the responsive Record according to the timelines set out in and as required by statute. This is also not consistent with best practices.

I look forward to receiving a copy of all responsive Records on or before June 1, 2011.

No Record was received and the HRP did not provide the precedent it stated it was relying on. On June 1, 2011 the HRP responded to my correspondence, which stated:

I am writing in response to your emails of May 20 & May 25 [sic] regarding the above noted matters.

In consultation with the Legal Department of HRM and our review of Section 463(2)(f) of the MGA, we are of the opinion that the portion of the material not provided to the applicant, namely the information relating to the “review regarding the Halifax Police officers involved in a lie-detector company carried out by the Bridgewater Chief...” is not a record subject to the MGA as these records are based on investigations and prosecutions pursuant to the Police Act and/or the Criminal Code of Canada. Section 463(2)(f) of the MGA states :

Notwithstanding subsection (1), this Part does not apply to a record relating to a prosecution, if all proceedings in respect of the prosecution have not been [sic] completed.

These matters are still proceeding and therefore are not subject to the MGA, and are therefore not subject to disclosure to the applicant or subject to the review process.

I realize this position varies from previous correspondence, however when we reviewed your submissions and the matter in its totality, we find that this is the position we are taking.

If you require additional information, please feel free to contact me.

In an attempt to sort out the exact nature of the responsive Record, the Review Office's Director provided HRP with the opportunity to discuss by phone, that conversation was summarized in correspondence to the HRP dated July 5, 2011, which stated:

The purpose of this letter is to summarize the relevant portion of our telephone conversation of June 17, 2011 and provide you with an outline of what I understand to be the responsive Record(s). In addition, the next steps are identified.

*In order to be able to move forward with this file, the Review Officer needs to understand the exact Record(s) that has been requested. There appears to be some confusion as to how many files are responsive, who has custody, who has control and what exemption or exclusion is being claimed. Below is my understanding in that regard. **If any part of the summary below is not correct, please let me know immediately.***

[Description of the three Records as provided by the HRP]

Operating on the assumption that this summary is correct, then the following is an outline on how this file should proceed.

Record #1 is the only responsive Record. This Record must be supplied to the Review Officer now. The other two investigations were conducted by other public bodies and HRP does not have custody or control of the resulting records.

HRP has most recently claimed that the Record (Record #1) is excluded from the Act because of the investigation being done by [an external investigative body]. The rationale is that a prosecution is a possible outcome. Because the previous investigations related to the matter form part of [the external investigative body's] active investigation, HRP believes the exclusion applies to Record #1 because it was "called in."

As I confirmed with you on the phone, in order to assess whether the Record is excluded or not, the Review Officer requires a copy of the Record. In addition, a Representation is required from HRP demonstrating how the exclusion applies. This would include, but is not limited to, evidence showing that there is an investigation being done by [the external investigative body], that the Record does form part of their investigation and evidence as to how it is "a record relating to a prosecution." You have indicated there is an investigation but "exclusion" only applies to where you have shown there is a prosecution (and not the mere possibility of one).

In light of the above information, if HRP no longer believes the Record is excluded but some or all of it must be withheld under an exemption, then that will be the focus of the Review – whether the exemption(s) has been applied in accordance with the Act. If this is the case, along with the Record, please provide a representation to clarify which exemption(s) is being applied.

If you now feel some information can be disclosed to the Applicant, please do so and copy the Review Office on that disclosure, including a copy of what was sent to the

Applicant in addition to the complete unsevered copy. A severed copy of the Record may satisfy the Applicant and resolve this Review. The focus of the Review would be the part of the Record that has been withheld, if this is not the case.

In order for me to better understand what kind of Record the Applicant is looking for, I have been in contact with [him/her]. [S/he] is not really interested in the entire investigation that was completed, [his/her] focus is on what was the allegation that was made and what was the finding/outcome of the investigation. [S/he] is not looking for the names of the Police Officer(s). As [s/he] has no way of knowing what type of document this information would be found in, [s/he] worded [his/her] access request more like a series of questions to help HRP to better understand the nature of the request. Knowing this, it might help HRP to identify which part(s) of the investigation are responsive to this Request.

If you do have any questions about any information above, or if my understanding of the Record is not correct, please contact me immediately to discuss. I will revise the outline as to how we will proceed accordingly, if necessary.

***As there has been significant delay, please send a copy of Record #1 and confirm if an exclusion or exemption is the reason for refusal to release to the Applicant on or before July 13, 2011. The associated Representation as outlined above, is required on or before July 20, 2011.
[Emphasis in original]***

The HRP failed to provide a copy of the Record to the Review Office as requested even though it confirmed in a conversation with the Review Office that the description below accurately describes the Record related to the internal investigation, a Record the HRP had in its custody or under its control.

On July 8, 2011, the Review Office received a letter from the HRP dated July 5, 2011, which stated:

I am writing in response to your letter of July 5, 2011 regarding the above noted matters.

I have again consulted with our Legal Department of HRM and we have reviewed Section 463(2)9f) of the MGA, and we continue to hold the opinion that the portion of the material not provided to the applicant, namely the information relating to the “review regarding the Halifax Police officers involved in a lie-detector company carried out by the Bridgewater Chief...” is not a record subject to the MGA as these records are based on investigations and prosecutions pursuant to the Police Act and/or Criminal Code of Canada.

Section 463(2)(f) of the MGA states :

Notwithstanding subsection (1), this Part does not apply to a record relating to a prosecution, if all proceedings in respect of the prosecution have not been completed.

These matters are still proceeding and therefore are not subject to the MGA, and are therefore not subject to disclosure to the applicant or subject to the review process.

If you require additional information, please feel free to contact me.

On July 15, 2011, the Review Office received a copy of letter from the HRP to the Applicant that was dated June 6, 2011, which stated:

Further to the letter I sent to you on 30th March 2011.

In the interest of greater clarity on our refusal to grant your access to the requested records, I wish to advise that the reason for the refusal is based on Section 463(2)(f) of the Municipal Government Act (MGA). The requested records are based on investigations and prosecutions to the Police Act and/or Criminal Code of Canada.

Section 463(2)(f) of the MGA states:

“Notwithstanding subsection (1), this Part does not apply to a record relating to a prosecution, if all proceedings in respect of the prosecution have not been completed.”

These matters are still proceeding, therefore, are not subject to the MGA and are not subject to disclosure to you as the applicant or subject to the review process.

When the investigation has been completed, we may be in a position to respond to your request more fully.

[Emphasis in original]

On July 15, 2011, I notified the Applicant and the HRP that I would communicate with both of them in the near future. The Applicant acknowledged receipt of my email on July 15, 2011 and also indicated that s/he had just received HRP's June 6, 2011 letter that day.

INTRODUCTION TO THE ISSUES

There are many issues that may arise in this Review including: whether the HRP provided adequate reasons to the Applicant in its decision; whether the Applicant has the right to receive part of the Record if the exempt information can be severed [s. 465(2)]; whether the failure of the HRP to locate and review the responsive Record prior to making a decision under the *MGA* is inconsistent with the *MGA* and best practice; whether the failure by HRP to make an open, accurate and complete decision on March 30, 2011 breached its statutory duty to assist [s. 467]; and whether or not the Record is excluded [s. 463(2)(f)] or if not excluded, alternatively, whether the exemption [s. 475(1)(c) – investigative techniques] has been appropriately applied by the HRP. To be clear at this stage, the latter is the only exemption that has been claimed by the HRP.

None of the issues identified above can be dealt with in the Review until the Record is provided by the HRP. This Review Report will, therefore, only deal with the issues relevant at this time - Whether the HRP is in contravention of the *MGA* and in particular:

1. By refusing to provide the Review Officer with the Record as required by s. 491 of the *MGA*.
2. By basing its refusal to provide the Record to the Review Officer on a decision under s. 463(2)(f) of the *MGA* when in fact there is only an ongoing investigation and no prosecution.
3. By failing to provide the Review Officer with any evidence to support its claim that the Record relates to an ongoing prosecution.

DISCUSSION

I find that the HRP made a decision to the Applicant to withhold the Record relying on an *exemption* under s. 475(1)(c) of the *MGA*. By making a decision relying on an exemption and by advising the Applicant of his/her right to Request a Review of that decision to me as *the* Review Officer, the HRP attorned to my jurisdiction under the *MGA*. When the Applicant filed a Request for Review of the HRP's decision, I find that I was under a statutory duty to conduct a Review and had no authority under the legislation to refuse. Once the Request for Review was filed, the Review Office requested the HRP to forward a complete copy of the Record responsive to the application within 15 days. That request was made on April 27, 2011.

The HRP indicated over the following months that a copy of the Record would be provided to the Review Office. The HRP has, however, reneged on its promise as it has not provided any portion of what it identified as, and agreed was, the responsive Record to the Review Office. I find that the HRP has failed to provide a copy of the responsive Record despite its representations it would do so and the Review Office's repeated requests for it to be provided.

The HRP made its first decision under one of the law enforcement exemptions pursuant to s. 475(1)(c) of the *MGA* on March 30, 2011. The HRP made a new decision dated June 6, 2011 received by the Applicant on July 15, 2011. That decision claimed that s. 463(2)(f) of the

MGA applied to the Record because “the requested records are based on investigations and prosecutions” and “these matters are still proceeding.”

Section 463(2)(f) of the MGA is not about investigations. It is about prosecutions. The HRP has confirmed with the Applicant and the Review Officer that there is an ongoing investigation or are ongoing investigations. I find that the HRP has not provided the Review Office with one scintilla of evidence of any pending or actual prosecution or any evidence that the Record relates to an ongoing prosecution, which is the statutory test for a Record to be excluded.

The provisions from the purpose section to which I have just referred simply make it clear that in order to achieve the Act's stated objectives, any exemptions or exceptions to the obligation upon a fully accountable government to provide its citizens with government information, must be limited and specific. Logic would dictate that any limitations upon the stated objective of insuring that public bodies are fully accountable, must be few and tightly drawn.

[O'Connor v. Nova Scotia (2001) NSCA 132]

[Emphasis in Original]

[Emphasis added]

The former Review Officer relied on *O'Connor* in a Review where he rejected the Department of Justice's claim that records held by the Medical Examiner's Office “relate to a prosecution” where he stated in interpreting the equivalent exception provision in the *Freedom of Information and Protection of Privacy Act*:

I accept the argument that the s. 4(2) exclusion is meant to apply to records relevant to criminal charges which have been laid if all proceedings in respect to the prosecution have not been completed. I accept that the records sought to be excluded must have “a logical reasonable connection” to the criminal charges laid. The Department has offered no proof of this.

[FI-05-47]

For clarity, what the HRP stated about the change in its decision, I repeat the following quote.

These matters are still proceeding and therefore are not subject to the MGA and are therefore not subject to disclosure to the applicant or subject to the review process.

I realize this position varies from previous correspondence, however when we reviewed your submissions and the matter in its totality, we find that this is the position we are taking.

[Emphasis added]

I am sensitive to how the discretionary exemptions should be applied with respect to law enforcement investigations. I find that s. 475 of the MGA provides the HRP ample opportunity to claim these discretionary law enforcement exemptions. In addition, the HRP was given the

opportunity to make full Representations to the Review Officer where the use of the exemptions is questioned in an Applicant's Request for Review. The statute gives the Review Officer clear authority to examine a Record [on a confidential basis] to which the law enforcement exemption(s) have been applied to withhold part or all of a Record to determine if the exemption has been applied appropriately.

I find the HRP is attempting to use an ongoing investigation that may or may not result in a prosecution as a means of avoiding producing the Record to the independent oversight Review Officer. By incorporating the language of investigations into its latest decision to the Applicant "the requested records are based on investigations and prosecutions", the HRP appears to be trying to transform what is an investigation into something in respect of a prosecution in order for the Record to fall under s. 463(2)(f). This approach is not consistent with a plain reading of the exception section of the *MGA*, which is silent with respect to investigations. To convert the exclusion provision with respect to prosecutions into something that can be used for an investigation would render the law enforcement exemptions under the *MGA* meaningless and is inconsistent with a plain reading of the statute [*See AG(ON) v. Toronto Star*]. I believe the HRP may be trying to rely on the *Toronto Star* case and failed to follow through on it providing a copy to me because it is patently clear that it is distinguishable as, in that case, there was clearly an ongoing prosecution.

In addition to how the law enforcement exemptions are applied, I am equally sensitive to the need to protect the integrity and sanctity of an ongoing prosecution and other information that may relate to that prosecution. That is why everything at the Review Office is done on a confidential basis and the Record or any information contained in the Record is *never* disclosed publicly or to any person and, in particular, to the Applicant. In this case the HRP has stalled and is now stonewalling the Review Officer impeding my ability to perform my statutory duty to investigate a Request for Review by not providing a copy of the Record. There is no evidence before the Review Officer of a prosecution, despite requests for the HRP to produce evidence of any prosecution in place or ongoing. I would be derelict in my duties if I were to allow the HRP to now claim the Record is excluded on its mere say so.

I find that it would be an absurd result if a public body was permitted to proceed in the manner in which the HRP has in this case: make a decision and claim an exemption under the *MGA*; advise the Applicant of his/her Right to Request a Review; indicate to the Review Office the Record was forthcoming and then do a complete about-face; change its decision and claim the Record is excluded. This appears to be an attempt to trump the jurisdiction of the Review Officer by not providing the Record thus disabling me from performing my statutory duty to conduct a Review of either decision rendering the independent oversight of the HRP's access decision non-existent. This is a very unsatisfactory and dangerous result. *Part XX* of the *MGA* is the law in place to guard against municipal public bodies such as the HRP being able to shield its access to information decisions from independent impartial oversight. I find that a public body's claim that a Record is excluded does not automatically exclude the statutory jurisdiction of the Review Officer as the oversight body. In an instance, such as this, a public body's claim cannot be accepted at face value. Because the HRP has made misrepresentations to the Review Office and dramatically altered its decisions to the Applicant, the Review Officer is required to ensure the exclusion applies, in fact and in law.

In this case, it is absolutely essential for the HRP to produce the Record to the Review Office to enable me to first determine whether it is excluded because there is ***evidence that the Record relates to a prosecution and all the proceedings in respect of that prosecution are not complete***. If there is evidence to prove that s. 463(2)(f) of the *MGA* applies to the Record once it has been reviewed, that will be the end of the matter. The Review file will be closed and the subject Record returned to the HRP. If it does not apply – the Record does not relate to a prosecution – a determination will be made that the Record is not excluded under the *MGA* and the Review will continue to determine if the HRP has appropriately applied the exemption regarding investigative techniques to withhold the Record.

It is imperative that the HRP produce and deliver to the Review Officer a copy of the responsive Record immediately. The *MGA* provides the HRP with ample exemptions including discretionary law enforcement exemptions to refuse access to the Applicant about an ongoing investigation though it chose to rely on only one exemption in its decision. An ongoing investigation does not, however, give the HRP the authority to refuse to hand over the Record to the Review Officer. The power to obtain a Record is laid out clearly in the *MGA*, which provides:

Powers of review officer

491 (1) Notwithstanding another Act of the Legislature, or any privilege that is available at law, a review officer may, in a review,

(a) require to be produced and examine any record that is in the custody, or under the control, of the municipality named in the request made pursuant to this Part; and

(b) enter and inspect any premises occupied by the municipality.

(2) A municipality shall comply with a requirement imposed by the review officer pursuant to clause (1)(a) within such time as is prescribed by the regulations.

The HRP may or may not have had custody of all of the Record at the time of the Application for Access to a Record. It has, however, confirmed the Record is its Record and therefore under its control. The NS FOIPOP Procedures Manual (2005), which relies upon *Alberta Order 99-03*, outlines factors to consider, some of which are listed as follows:

- ***the record was created by an officer, employee or member of the public body;***
 - *the record was created by an outside contracted consultant for the public body;*
 - *the record is in the possession of the public body;*
 - *the record is closely integrated with other records of the public body;*
 - *the content of the record relates to the public body's mandate and functions;*
 - ***the public body has the authority to regulate the record's use and disposition;***
 - *the public body has relied upon the record to a substantial extent;*
- [Emphasis added]***

The HRP is required to obtain and provide a copy of the responsive Record regardless of what other agency may have a copy the HRP provided to it. The HRP appears to be trying to suggest that once a Record is shared with other agencies it is no longer a Record under its control. This is nonsensical and a clear departure from all records management rules. In *ON Order MO-2381*, the following are some factors that may apply where an individual or organization other than the institution holds the Record:

- *If the record is not in the physical possession of the institution, who has possession of the record, and why?*
- *Is the individual, agency or group who or which has physical possession of the record an “institution” for the purposes of the Act?*
- ***Who owns the record? [Order M-315]***
- *Who paid for the creation of the record? [Order M-506]*
- ***What are the circumstances surrounding the creation, use and retention of the record?***

[Emphasis added]

In any event, the HRP has already confirmed the Record is its Record and as such the HRP has rights and obligations with respect to that Record. The HRP is required to make all reasonable efforts to obtain a copy to enable it to provide it to the Review Officer.

[para 91] As explained above, I have found that the Public Body has control under the FOIP Act over the records held by Conroy Ross, which were created as part of Conroy Ross’s [sic] contractual obligations to the City of Edmonton acting on behalf of the Public Body. As a consequence, the Applicant has a right of access to these records, and the Public Body’s duty to assist the Applicant in relation to his request for them also arises.

[para 92] I find that the steps taken by the Public Body to obtain the records in the possession of Conroy Ross are wholly inadequate. At the very least, given the contractual terms negotiated by the City of Edmonton [sic] its behalf and to which it agreed, it should have considered whether it had control over the records. Instead, it accepted the arguments of Conroy Ross presented in its letter of November 10, 2008, and which run counter to a plain reading of the contract.

[para 93] The Public Body has given no indication that it has taken steps, legal or otherwise, to obtain the records in the possession of Conroy Ross. However, as it has control over the records, section 6 gives the Applicant a right of access to them, and section 10(1) imposes a duty on the Public Body to assist the Applicant in relation to his request for them. The Public Body must therefore take all reasonable steps to obtain the records, including any necessary legal steps, in order to assist the applicant for the purposes of section 10(1), and I will order it to do so.

[Alberta Order F2010-023]

It is essential to the purpose of the statute – *ensure that municipalities are fully accountable to the public by (v) providing for an independent review of decisions made pursuant to this Part [See s. 462(a)(v) of the MGA]* that the Review Officer review the Record to ensure the public body is appropriately applying the legislation. If permitted to do what it is proposing, the HRP's conduct would stand as a precedent for public bodies trying to escape from under the oversight provisions by claiming a record is excluded and not having to back that claim up with anything. This would in effect frustrate the entire oversight mechanism under the legislation.

The Review Office takes its access and privacy oversight roles very seriously. Confidentiality is the penultimate value instructing our work. No Record that is provided to our Office is ever released to any person and its contents are never made known to any person during or after a Review. In its 15 years of being the oversight body, the Review Office has never had an instance of a breach of this confidentiality imperative. Each person at the Review Office is required to take an oath of confidentiality. At all times the Review Office complies with the governing statute and would never release the contents of a Record. The whole Ombudsman model on which the *MGA* is designed is premised on investigating a matter including reviewing a record in private and complete confidence. The role of the Review Officer is to make findings and recommendations to report on whether a public body has appropriately applied the *MGA*: never to report on the information in a record. I find the HRP's lack of cooperation and apparent lack of faith in how the Review Office would deal with a potentially highly sensitive Record, given our reputation for confidentiality, very disturbing.

I understand and appreciate that the HRP wants to proceed carefully with respect to information about criminal investigations that may at some time result in prosecutions before the Courts. That is why the statute has exemptions for the purpose of dealing with an investigative record. I find that by making a decision under one of the law enforcement exemptions under the *MGA* and subsequently trying to excuse itself from producing the Record to the Review Officer because it claimed it no longer had custody of the Record and then making a new decision that the Record is excluded, the HRP has subjugated the whole purpose of the oversight provisions. The HRP, in the course of refusing to produce the Record, has shown little, if any, respect for the governing legislation or the Office of the Freedom of Information and Protection of Privacy Review Officer. I find that it would be unconscionable to let the HRP's decision stand that characterizes an investigation Record as a Record related to a prosecution when there is not one scintilla of evidence of a prosecution.

FINDINGS

I make the following findings with respect to the issue of the HRP's failure to provide the Review Officer with the Record:

1. I find that the HRP made a decision to the Applicant to withhold the Record relying on an *exemption* under s. 475(1)(c) of the *MGA*. By making a decision relying on an exemption and by advising the Applicant of his/her right to Request a Review of that decision to me as *the* Review Officer, the HRP attorned to my jurisdiction under the *MGA*.
2. When the Applicant filed a Request for Review of the HRP's decision, I find that I was under a statutory duty to conduct a Review and had no authority under the legislation to refuse.
3. I find that the HRP has failed to provide a copy of the responsive Record despite its representations it would do so and the Review Office's repeated requests for it to be provided.
4. I find that the HRP has not provided the Review Office with one scintilla of evidence of any pending or actual prosecution or any evidence that the Record relates to an ongoing prosecution, which is the statutory test for a Record to be excluded.
5. I find that s. 475 of the *MGA* provides the HRP ample opportunity to claim these discretionary law enforcement exemptions.
6. I find the HRP is attempting to use an ongoing investigation that may or may not result in a prosecution as a means of avoiding producing the responsive Record to the independent oversight Review Officer. By incorporating the language of investigations into its latest decision to the Applicant "the requested records are based on investigations and prosecution" the HRP cannot transform what is an investigation into something in respect of a prosecution in order to fall under s. 463(2)(f). To convert the exclusion provision with respect to prosecutions into something that can be used for an investigation would render the law enforcement exemptions under the *MGA* meaningless.
7. I find that it would be an absurd result if a public body was permitted to proceed in the manner in which the HRP has in this case: make a decision and claim an exemption under the *MGA*; advise the Applicant of his/her Right to Request a Review; indicate to the Review Office the Record was forthcoming and then do a complete about-face; change its decision and claim the Record is excluded.
8. I find that a public body's claim that a Record is excluded does not automatically exclude the statutory jurisdiction of the Review Officer as the oversight body. In an instance, such as this, a public body's claim cannot be accepted at face value. Because the HRP has made misrepresentations to the Review Office and dramatically altered its decisions to the Applicant, the Review Officer is required to ensure the exclusion applies, in fact and in law.
9. I find the HRP is using an ongoing investigation that may or may not result in a prosecution as a means of avoiding producing the responsive Record to the independent oversight Review Officer.
10. I find the HRP's lack of cooperation and apparent lack of faith in how the Review Office would deal with a potentially highly sensitive Record, given our reputation for confidentiality, very disturbing.

11. I find that by making a decision under one of the law enforcement exemptions under the *MGA* and subsequently trying to excuse itself from producing the Record to the Review Officer because it claimed it no longer had custody of the Record and then making a new decision that the Record is excluded, the HRP has subjugated the whole purpose of the oversight provisions.
12. I find that it would be unconscionable to let the HRP's decision stand that characterizes an investigation Record as a Record related to a prosecution when there is not one scintilla of evidence of a prosecution.

RECOMMENDATIONS

I make the following recommendations to the HRP:

1. The HRP provide the Review Office with a copy of the complete and accurate Record; and
2. The HRP provide the Review Office with evidence that there is an ongoing prosecution and evidence as to how the Record relates to a prosecution.

The HRP is required to make a decision with respect to my Recommendations within thirty days of receipt of this Report and advise the Applicant and the Review Office, in accordance with section 493 of the *MGA*. The Applicant has a right to appeal to the Nova Scotia Supreme Court, which right s/he must be notified of by the HRP in its decision letter regarding the Recommendations.

Respectfully,

Dulcie McCallum
The Freedom of Information and Protection of Privacy Review Officer