



REPORT
Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-11-43

Report Release Date: August 28, 2012

Public Body: Service Nova Scotia and Municipal Relations

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

The Record at issue in this Review is a one-page letter containing medical information about the Applicant and his/her ability to drive authored by the Third Party informant.

Issues:

1. Has Service Nova Scotia properly withheld the personal information of the Applicant under s. 20 of the *Act*?
2. Has Service Nova Scotia properly considered all relevant circumstances with respect to its decision to withhold the personal information of the Third Party under s. 20 of the *Act*?
3. Has Service Nova Scotia properly interpreted and complied with the Third Party notice provisions under s. 22 of the *Act*?

Key Words: author, common-sense, confidential, consent, driving, guidance, informant, informed consent, medical information, personal information, public good, relevant circumstances, safe, summary, Third Party.

Statutes Considered: *Freedom of Information and Protection of Privacy Act, Stats NS 1993, c. 5, ss. 2, 3(1)(i), 20, 20(1), 20(2)(f), 20(3), 22, 22(5), 38, 45.*

Case Authorities Cited: *NS Review Reports FI-08-108, FI-08-23, FI-09-40, FI-99-14, FI-08-107, FI-10-41/FI-10-85/FI-10-86/FI-10-87, FI-08-26(M), FI-07-69(M), FI-05-51, FI-00-99; BC Order No 28-1994; French v. Dalhousie University 2002 NSSC 22 (affirmed on appeal at 22 NSCA 16); Re House 2000 Can LII 20401 (NSSC).*

Other Cited: *Nova Scotia Procedures Manual – FOIPOP (2005), c. 5-3 and 5-4.*

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PRELIMINARY NOTE

Service Nova Scotia and Municipal Relations [“Service Nova Scotia”] provided information to the Review Office during the Review that attempted to explain how it processed this and other Applications for Access to a Record. What it refers to as its ‘common-sense’ approach involves making decisions without strict compliance with the *Freedom of Information and Protection of Privacy Act* [Act]. Some of the Findings below will address the approach that is required by the statute. At the time of providing this explanation to the Review Office, Service Nova Scotia also indicated that the Review Officer could make whatever Recommendations she wanted to, the Administrator would simply refuse to implement them. I am hopeful that this comment was said in haste and did not fully represent the position of Service Nova Scotia or reflect how it ordinarily operates under the access to information legal scheme established under the *Act*. If that is how, in fact, Service Nova Scotia operates in relation to its responsibility to make a decision in response to the Findings and Recommendations of the Review Officer, this causes me serious concern.

The Legislature chose to base the Review Process on an Ombudsman-model. This model presumes that public bodies will engage in and respect this non-biased, independent, fact-finding investigative process. Quasi-judicial administrative review processes such as the Review Officer’s, are put in place to preserve public confidence in the government by ensuring that it always adheres to the rule of law and is thereby accountable. In short, Nova Scotians chose to rely on the Review Officer as its means of maintaining legislative supremacy over access and privacy matters. Any indication that public bodies make a pre-determination, at the outset of the Review process, that they intend to ignore the findings and recommendations of the Review Officer and, essentially, do what they want, regardless of what the statute provides, is very problematic. If this emerged as a pattern, it would be of justification to ask the Legislative Assembly to amend the *Act* to give the Review Officer order-making power similar in kind to other Commissioners across Canada.

BACKGROUND

The Applicant filed an Application for Access to a Record with Service Nova Scotia dated March 17, 2011 [received March 23, 2011], which read as follows:

*Require all medical information related to R.M.V. file.
Date of Birth: [Applicant's Birth Date]
Master number: [Applicant's Driver licence number]*

On April 15, 2011, Service Nova Scotia faxed a letter to a Third Party, the author/informant of the information in the Record. The letter read as follows:

Service Nova Scotia and Municipal Relations (SNSMR) has received a Freedom of Information and Protection of Privacy Act request from [Named Applicant]. [Named Applicant] is requesting all medical information in [his/her] RMV file.

The attached letter from you, dated [date], is in [the Named Applicant's] RMV file.

Under the Nova Scotia Freedom of Information and Protection of Privacy Act it is required to obtain 3rd party approval before we can disclose personal information provided by a 3rd party, to an applicant. Since you are a 3rd party, we require your consent to disclose or not to disclose the attached document before I can proceed with [the Named Applicant's] request.

Could we please request your review of the attached and if you consent to the release of this letter, please sign and indicate approval to release on the letter. If you do not want the letter released, please sign, date and indicate your reasons for not releasing. Please return the letter to us by fax at 424-[XXXX] to my attention. [Emphasis in original]

On April 18, 2011, the Third Party responded. The Third Party did not consent to the release of the Record and provided reasons for withholding his/her consent.

On April 21, 2011, Service Nova Scotia released the following decision to the Applicant:

The information you have requested may affect the interests or invade the personal privacy of a third party. As such, under the Freedom of Information Protection of Privacy Act, before personal information can be disclosed, 3rd party approval must be obtained. We have contacted the third party and they do object to the release of the information, therefore, the information requested will not be provided to you.

Service Nova Scotia did not cite an exemption from the Act in its decision letter to the Applicant. On January 17, 2012, Service Nova Scotia communicated to the Review Office that it had invoked s. 20(2)(f) of the Act. Ensuing Representations from Service Nova Scotia seemed to indicate that it was also relying upon another, discretionary,

exemption. On June 18, 2012 however, Service Nova Scotia made it clear that they were only relying on a single “exemption”, s. 20(2)(f) of the *Act*.

On May 5, 2011, the Review Office received a Request for Review from the Applicant. The Form 7, dated May 2, 2011, which read, in part, as follows:

2. The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body;
(a) decision dated or made on the 21 day of April, 2011, a copy of which is attached to this Request for Review;

3. The applicant requests that the review officer recommend that:
(a) the head of the public body give access to the record as requested in the Application for Access to a Record;

On July 22, 2011, as the Freedom of Information and Protection of Privacy Review Officer, I approved a request to expedite this file. On July 28, 2011, Service Nova Scotia was advised of the decision to expedite the Review. The request to expedite was approved based upon the Applicant’s Representation to me, as the Review Officer, that s/he needed to understand the reason his/her licence had been revoked and what s/he needed to do to make a reapplication to have his/her licence restored.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Service Nova Scotia provided the Freedom of Information and Protection of Privacy Review Officer with a copy of the Record, all of which was withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant or any other person by the Review Officer or her delegated staff.

At the outset of the Review, Service Nova Scotia was asked to provide a copy of the responsive Record and all relevant documentation. Service Nova Scotia produced a copy of the responsive Record, a one page letter. It also provided a number of documents from the Applicant’s motor vehicle file. The relevance of the other information was not referred to in Service Nova Scotia’s Representations, nor was it otherwise apparent. I have, therefore, not considered the additional documents provided as Service Nova Scotia did not establish that they were relevant to this Review.

The Record at issue in this Review is a one-page letter containing medical information about the Applicant and his/her ability to drive, authored by the Third Party informant.

ISSUES UNDER REVIEW

1. Whether Service Nova Scotia properly withheld the personal information of the Applicant under s. 20 of the *Act*.
2. Whether Service Nova Scotia properly considered all relevant circumstances with respect to its decision to withhold the personal information of the Third Party under s. 20 of the *Act*.

3. Whether Service Nova Scotia properly interpreted and complied with the Third Party notice provisions under s. 22 of the *Act*.

REVIEW FINDINGS

ISSUE #1: Has Service Nova Scotia properly withheld the personal information of the Applicant under s. 20 of the *Act*?

1. The Applicant has a right to access his/her personal information under the *Act*, as provided for in the purpose section, which provides, in part, as follows:

2 The purpose of this Act is

- (a) to ensure that public bodies are fully accountable to the public by . . .*
 - (ii) giving individuals a right of access to, and a right to correction of, personal information about themselves, . . .*
- (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to . . .*
 - (ii) ensure fairness in government decision-making,*
- (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies and to provide individuals with a right of access to that information. 1993, c. 5, s. 2.*

The Applicant's statutory right to access to his/her personal information is guaranteed unless an exemption(s) under the *Act* is found to apply [Refer to FI-08-108; FI-08-23; FI-09-40]. The definition of personal information reads, in part, as follows:

- 3(1)(i). . . means recorded information about an identifiable individual, including*
- (i) the individual's name . . .*
 - (iii) the individual's age, sex . . .*
 - (vi) information about the individual's health-care history, including a physical or mental disability . . .*
 - (viii) anyone else's opinions about that individual,*

I find the responsive Record contains the personal information of the Applicant as it is defined in ss. 3(1)(i)(i), (iii), (vi), (viii) of the *Act*. The Record is primarily made up of medical information about the Applicant, which is what s/he requested, all of which is ***the Applicant's own personal information***. [Refer to *French v. Dalhousie University 2002 NSSC 22 (affirmed on appeal at 22 NSCA 16)*].

- 2) The Applicant's right to access his/her personal information is subject to any applicable exemptions. The exemptions that apply will require [mandatory exemption] or enable [discretionary exemption] a public body to withhold all or part of the Record.

While it did not distinguish between the Applicant's personal information and the Third Party's personal information, I find that Service Nova Scotia represented that its decision to withhold the Record in full was based solely on s. 20(2)(f) of the *Act*, which reads as follows:

In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all relevant circumstances, including whether (f) the personal information has been supplied in confidence, [Emphasis added]

- 3) In order to make a determination that disclosure of personal information constitutes an unreasonable invasion of a Third Party's personal privacy, a public body must make a determination under s. 20(1) or s. 20(3) of the *Act*. In this case, Service Nova Scotia simply relied on one consideration – that the personal information was supplied in confidence – listed in s. 20(2). I find Service Nova Scotia misapplied s. 20 of the *Act* with respect to the personal information of the Applicant by failing to make a determination in accordance with s. 20(1) or s. 20(3) of the *Act*.

Section 20(2)(f) of the *Act* is not an exemption but is included as one of the relevant circumstances in s. 20 to provide the public body with guidance in its decision-making [*Refer to FI-99-14*]. Section 20(2) contains a non-exhaustive list of relevant circumstances for a public body to consider in **making a determination under subsection (1) or (3)** whether or not disclosure would constitute an unreasonable invasion of a **third party's** personal privacy. I find Service Nova Scotia erred by relying solely on s. 20(2)(f) of the *Act* as it is not an exemption. In other words, bare reliance on a relevant circumstance is not sufficient to refuse to disclose a Record.

There are two kinds of personal information contained in the responsive Record, the Applicant's and the Third Party's. Section 20 concerns the disclosure of a Third Party personal information only, not an Applicant's. To be clear, s. 20 does not apply to the Applicant's own personal information.

Public bodies bear the burden to establish that s. 20 of the *Act* applies, as provided for in s. 45 of the *Act* [*Refer to FI-08-107*]. In this case, Service Nova Scotia has not shown that s. 20 applies to the Applicant's own personal information. As Service Nova Scotia did not claim any other exemptions, I find that Service Nova Scotia has failed to demonstrate any basis for withholding the Applicant's personal information.

ISSUE #2: Has Service Nova Scotia properly considered all relevant circumstances with respect to its decision to withhold the personal information of the Third Party under s. 20 of the Act?

- 4) The second kind of personal information to consider is the Third Party personal information. The letter contains the Third Party informant's name, address, and phone and fax number. Such personal data identifiers are defined as "personal information" pursuant to s. 3(1)(i)(i) of the *Act*.

Public bodies bear the burden to establish that s. 20 of the *Act* applies, as provided for in s. 45 of the *Act* [*Refer to FI-08-107*]. Section 20 of the *Act* is a mandatory exemption. Mandatory means that when Third Party personal information is at stake, public bodies must consider it.

Service Nova Scotia's original decision to the Applicant does not cite any particular section of the *Act*. It does refer to refusing the Record based on it containing the personal information of a Third Party. This lack of specificity under s. 20(1) or s. 20(3) of the *Act* is not ideal given that the *Act* requires the exemptions to be limited and specific [*Refer to s. 2(a)(iii) of the Act*]

Service Nova Scotia did provide Representations to the Review Officer that explained how s. 20 applies to the Third Party's personal information. In doing so, the public body specifically relied on s. 20(2)(f) of the *Act*. However, s. 20(2)(f) is not an exemption. Nevertheless, for the purpose of this case, and looking at the decision letter to the Applicant, I find Service Nova Scotia intended to make a decision under s. 20 of the *Act* with respect to the Third Party's personal information. I will now consider whether the Third Party information should be withheld under s. 20 of the *Act*.

- 5) The information about the Third Party contained in the Record falls within the definition of personal information and thus Service Nova Scotia must make a decision under s. 20 of the *Act*. In summary, the *Re House* analysis:
- the Record contains Third Party personal information,
 - s. 20(3) and s. 20(4) of the *Act* do not apply,
 - the analysis must go on to consider the factors listed in s. 20(2) of the *Act*.
- [*Refer to House, Re 2000 Can LII 20401 (NSSC)*].

I turn now to the question that needs to be answered when making a determination under s. 20(1) of the *Act* - what factors need to be considered when deciding whether disclosure will likely result in an unreasonable invasion of this Third Party's personal privacy? And, because s. 20 is a mandatory exemption, I find it is incumbent on me, as the Review Officer, to consider *all* relevant circumstances even those not specifically listed in s. 20(2) of the *Act*. This obligation remains even where the public body has failed to do so, as is the case here. I will now discuss each relevant consideration, in turn:

- i) Service Nova Scotia relied on one relevant circumstance listed at s. 20(2)(f) of the *Act*: supplied in confidence. Though the Record itself bears no indication that it was provided on a confidential basis, the public body provided some evidence to the Review Officer that the Third Party intended it to be confidential. I find Service Nova Scotia appropriately considered the Third Party's expectation that his/her personal information was provided on a confidential basis to be a relevant consideration.
- ii) The Third Party sent an unsolicited letter to the Registrar of Motor Vehicles (under Service Nova Scotia) providing information with respect to the driving ability of the Applicant. Under s. 22 of the *Act*, notice was given to the Third Party seeking his/her consent to disclose the Record (details of how s. 22 of the *Act* was misinterpreted by Service Nova Scotia will be discussed below). In response to being given notice, the Third Party withheld his/her consent to the release of the Record. I find the fact the Third Party withheld his/her consent to be a relevant consideration.
- iii) The Third Party sent the unsolicited letter to Service Nova Scotia containing medical information about the Applicant out of an apparent concern for his/her ability to drive. Service Nova Scotia relies on informants from all walks of life to contact the Department if the informant has concerns with respect to a member of the public's driving. As with many cases, the Third Party informant's contact information, such as name, address and phone number, formed part of the Record. I find that the ability of Service Nova Scotia to further investigate concerns about potentially unfit drivers is a relevant consideration to be considered under s. 20(2) of the *Act*
- iv) Any decision with respect to continuing or withdrawing driving privileges rests solely with the Registrar of Motor Vehicles (under Service Nova Scotia). If the personal information about the Third Party informants is released by Service Nova Scotia to Applicants about whom the report has been made, informants may be reluctant to come forward with their concerns [*Refer to BC Order No 28-1994*]. I also find that the public good is served by Service Nova Scotia monitoring drivers' abilities to keep the public safe. I find, therefore, that public good is a relevant factor that should have been considered in making a decision under the *Act*.

In *BC Order No 28-1994*, I was impressed by the effort that the public body put into providing their Commissioner with evidence of the public good that is achieved by promoting driving reporting and the risk of disclosing informant identities. Unfortunately, no similar evidence was offered by Service Nova Scotia in its Representations. Furthermore, there is no indication that Service Nova Scotia made any effort to consult with the Registrar of Motor Vehicles. Decisions to deny access to information must always be founded on reasoned decision-making and solid evidence, not speculation, or what Service Nova Scotia referred to as 'common sense'. In this case, there was relevant and compelling evidence available through our research, which I have considered. I have noticed that increasingly FOIPOP Administrators are relying on the Review Office to do their research, which trend should not continue.

- v) I find another relevant consideration is the Applicant's right to a fair process when seeking to have his/her licence reinstated. This cannot be achieved without the Applicant having some knowledge of the basis for a public body decision. As well, Service Nova Scotia should be accountable when it makes a decision to suspend a driving licence on the basis of an unsolicited report. A person's ability to drive, travel, and in some cases, to continue being employed may depend on having a driving licence. This is the very reason why the Applicant seeks access to his/her personal information provided to Service Nova Scotia. I find the Applicant is entitled to his/her personal information in order to know how s/he can get his/her licence reinstated. I find that this can be achieved without compromising the identity of the Third Party.

Taking into account all the relevant considerations, I find the part of the Record that is not the Applicant's personal information is the Third Party's personal information and should not be disclosed to the Applicant. I find the Third Party's personal information, in particular, his/her name, address, phone and fax numbers was properly withheld by Service Nova Scotia [Refer to FI-99-14]. In this case, redaction alone may still reveal the identity of the Third Party. For this reason and because the Third Party information was supplied in confidence, I find that a summary of Applicant's personal information should have been generated from the responsive Record and provided to the Applicant pursuant to s. 22(5) of the *Act*.

ISSUE #3: Has Service Nova Scotia properly interpreted and complied with the Third Party notice provisions under s. 22 of the *Act*?

- 6) I find Service Nova Scotia misinterpreted the Third Party notice provisions in s. 22 of the *Act*, the particulars of which include:

- i) Service Nova Scotia stated the following in its decision letter:

... before personal information can be disclosed, 3rd party approval must be obtained. We have contacted the third party and they do object to the release of the information, therefore, the information requested will not be provided to you. [Emphasis added]

I find Service Nova Scotia erred in its decision letter and misrepresented the consultation process under s. 22 of the *Act* by explicitly stating the decision rested with the Third Party – ***approval must be obtained.***

- ii) The Third Party, the author of the Record that contains his/her personal information as well as the Applicant's, is given the opportunity under s. 22 of the *Act* to withhold his/her consent ***with respect to his/her own*** personal information. But the consent requested from the Third Party by Service Nova Scotia is only relevant with respect to his/her own personal information, not the Applicant's personal information. While a public body should consider the views of the Third Party in making its decision as to whether or not

information must be refused pursuant to s. 20 of the *Act*, those views must only be in relation to the Third Party's personal information, not the Applicant's. I find Service Nova Scotia erred by not restricting its request to the Third Party to only asking him/her for his/her consent in relation to his/her personal information and an invitation for reasons if consent is withheld.

- iii) Service Nova Scotia represented that it considered the Record to be owned by its author, the Third Party informant. The fact that the Record may also be a document in a file elsewhere does not negate the fact that for the purpose of the *Act* the Record is a Record of Service Nova Scotia because it is in its custody or under its control [*Refer to FI-00-60*]. For the purpose of this Review, I find the Record was a Record of Service Nova Scotia.
- iv) Service Nova Scotia gave no reasons for its decision to withhold the Record in full other than the Third Party's refusal to consent to its release. In its decision letter to the Applicant, Service Nova Scotia clearly states that because the Third Party objects, the information will not be released. This is another example of its 'common-sense' approach but is a misrepresentation by Service Nova Scotia of what the *Act* stipulates. I find Service Nova Scotia erred in deciding that because the Third Party is the author of the Record providing medical information and that because the Third Party withheld his/her consent to disclose the Record, these factors were definitive as to whether or not the Record should be disclosed. I find Service Nova Scotia erred in deferring its decision-making responsibility under the *Act* to the Third Party. I find that the decision with respect to the disclosure rested solely with Service Nova Scotia as the public body responsible for the Record.
- v) Service Nova Scotia released the name of the Applicant to the Third Party as part of asking him/her whether or not s/he would consent to the release of the Record. Service Nova Scotia never asked the Applicant for his/her consent to release his/her identity to the Third Party, as was required by law. Public bodies are *never* to release the name of an applicant other than to those who work for the public body, and then only on a need-to-know basis [*Refer to the Nova Scotia Procedures Manual – FOIPOP (2005), c. 5-3 and 5-4*].

Service Nova Scotia represented that by filing an Application for Access to Record or by completing the Form 1, the Applicant provided his/her consent to release his/her name. Service Nova Scotia maintains that this interpretation is necessary in order to allow the Third Party to locate or otherwise identify the Record.

In fact, Service Nova Scotia did not need to disclose the Applicant's identity without their consent. The *Act* provides three options to the public bodies. The first option was to seek Third Party's consent without identifying the Applicant to the Third Party. An example of this wording would be, "the attached Record has been requested under the *Act*". Using this approach, if the Third Party were to have requested the Applicant's identity, the Applicant

can be invited to consent to having their identity shared with the Third Party (this will be discussed in more detail below). The second option was to seek the Applicant's explicit and informed consent for the disclosure of his/her identity to the Third Party at the time the s. 22 notification was made to the affected Third Party. The third option was to withhold the Third Party information based upon an applicable exemption(s), mandatory or otherwise, without seeking the Third Party's consent [*Refer to s. 22(1A)(6)*]. This final option would still require complete reasons to be provided by the public body in its decision. To be clear, every one of these options fully complies with s. 22 of the *Act*. There was no need to identify the Applicant in order for the Third Party to locate or identify the Record for the purpose of notification.

The practice of sharing either a copy of the Record or a summary of the Record, with an affected Third Party warrants further comment. Third Party consent to the release personal or confidential information must be informed consent. This means that the Third Party is entitled to have knowledge of the nature of his/her personal or confidential information that the public body is considering releasing. In the case of personal information, the Third Party must know what information is at issue before s/he can decide whether this information, if disclosed, would result in an unreasonable invasion of his/her privacy. In this case, the Record was authored by the Third Party and sent directly to Service Nova Scotia. Other cases may require a summary, description or redacted copy of the requested Record where the Third Party is not the author but has an interest in the Record. To reiterate, I find that it was appropriate in this case for Service Nova Scotia to provide the Third Party with a copy of his/her own letter to Service Nova Scotia when providing s. 22 notification under the *Act*. That being said, having provided a copy of the letter to the Third Party, I find it unreasonable for Service Nova Scotia to continue to maintain that the disclosure of the Applicant's identity is necessary in order for the Third Party to identify or locate the Record. It is important that all public bodies made the distinction in what they provide to Third Parties under s. 22 notifications between identifying the Record for the Third Party and identifying the Applicant to the Third Party.

The requirement to maintain the identity of applicants in confidence has required repeated mention in Review Reports [*Refer to FI-10-41/FI-10-85/FI-10-86/FI-10-87, FI-08-26(M), FI-07-69(M), FI-05-51, and FI-00-99*].

I find that Service Nova Scotia had no authority to disclose the Applicant's identity to the Third Party and by doing so breached the privacy of the Applicant. To be clear, I find that Service Nova Scotia breached the Applicant's privacy by disclosing their identity to the Third Party without the Applicant's consent.

REVIEW RECOMMENDATIONS

I make the following Recommendations to Service Nova Scotia:

1. Service Nova Scotia release a summary of all of the Applicant's personal information. An example summary has been provided to Service Nova Scotia.
2. Service Nova Scotia provide the Review Officer with a copy of its decision letter to the Applicant and the summary of the Record as provided to the Applicant.
3. Service Nova Scotia revisit and amend its Third Party consultation process to be in full compliance with s. 22 of the *Act*, including amending its template letters, copies of which are to be provided to the Review Officer.
4. Service Nova Scotia request a privacy consultation with the Review Officer under s. 5(f) of the *Privacy Review Officer Act* to explore the privacy practices of the Registry of Motor Vehicles Branch, in particular, the collection, use and disclosure of personal information related to driver's licences.
5. Service Nova Scotia make a decision in response to these Recommendations within 30 days of receipt of this Review Report.

Respectfully submitted,

Dulcie McCallum, LLB

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