



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

REVIEW REPORT FI-12-10

Report Release Date: August 13, 2013

Public Body: Department of Justice

Record at Issue: At no time are the contents of a Record disclosed or the Record released to an applicant, third party or any other person by the Review Officer or her delegated staff.

The Maintenance Enforcement Program [“MEP”] falls under the Department of Justice [“Justice”]. Justice provided the Review Officer with a complete copy of the responsive Record and a copy of the severed Record disclosed to the Applicant pursuant to the *Freedom of Information and Protection of Privacy Act* [“FOIPOP Act”].

The Record consists of 179 pages. It is made up entirely of information provided to the Director of MEP under the *Maintenance Enforcement Act* [“MEA”]. The Record does not consist of any administrative files concerning the MEP.

Key Issues: The issues the Review Officer must decide are the following:

1. Whether the responsive Record is wholly made up of information provided to the Director of MEP that falls under s. 32 of the *MEA*?
2. If the answer is yes, whether s. 32 of the *MEA* is paramount to the *FOIPOP Act* pursuant to s. 4A(2)(j)?
3. If yes, whether Justice erred by making a decision to process the Application for Access to a Record under the *FOIPOP Act*?
4. Whether Justice is in contravention of s. 4A of the *FOIPOP Act*, its own Privacy and Security Procedures Manual and s. 33 of the *MEA*?

Recommendations:

1. Effective immediately upon acceptance of this Recommendation, Justice will change its past and present practice by:
 - a. complying with the *FOIPOP Act* in relation to access requests for information provided to the Director of MEP; **and**
 - b. committing to follow the direction provided in its Privacy and Security Procedures Manual with respect to processing access requests for information provided to the Director under the *MEA*.
2. Justice will issue a new decision to the Applicant, in line with this Review Report's findings, that the *MEA* is paramount to the *FOIPOP Act* and in order to obtain access to information held by the Director of the MEP, the Applicant is to contact the Director of the MEP directly with their request for information. The new decision should include advice to the Applicant that the Director of the MEP makes her decision under tests provided for in s. 32 of the *MEA* and that the *FOIPOP Act* exemptions previously applied by Justice have no application to this access request as they do not apply under the *MEA*. This is to be done within 7 days of the acceptance of this Recommendation. A copy is to be provided to me at the same time;
3. Justice, as the department responsible for the training and day-to-day support of FOIPOP Administrators through the IAP office, will develop and publish a policy and/or tool with respect to conflicts between the *FOIPOP Act* and other enactments. That includes information that is restricted either pursuant to s. 4A of the *FOIPOP Act* or under an enactment with a notwithstanding clause. Justice is to provide a copy of this policy and/or tool to the Review Officer. This is to be done within 30 days of the acceptance of this Recommendation; **and**
4. Justice will incorporate the policy and/or tool into the *Nova Scotia FOIPOP Administrators Policy and Procedure Manual (2005)*, the FOIPOP Administrator basic training course, and any ongoing support and assistance it provides to Administrators. This is to be done in time to be incorporated into the next training session after the acceptance of this Recommendation.

Justice will provide me with the date of the next scheduled training and provide me with a copy of the pages amended to the training manual.

Key Words Considered: contravention, executor, maintenance enforcement, paramount, payee, payor, prevails.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 4A(1), s.4A(2)(j); *Maintenance Enforcement Act*, 1994-95, c. 6, s. 32, s. 33.

Case Authorities Cited: *Roncarelli v. Duplessis*, [1959] S.C.R. 121; NS Review Reports *FI-12-62*; *FI-99-04*; BC Decision *FI0-12 [2010 BCIPC 52 (CanLII)]*.

Others Cited: Privacy and Security Procedures Manual, Department of Justice (April 3, 2009)

REVIEW REPORT FI-12-10

Background

On December 16, 2011 the Applicant, the Executor to the Estate of a Payee under the Maintenance Enforcement program, made an Application for Access to a Record under the custody and control of the Department of Justice that read as follows:

1. *This is an application pursuant to the Freedom of Information and Protection of Privacy Act for access to: . . .*
2. *I am applying for access to the following record:*

Maintenance Enforcement for all correspondence, materials, garnishee orders and documentation on file relating to the payment of support by [Named Payer] to [Named Payee] under MEP Case File [Case File Number] in [Municipality], Nova Scotia.

A letter from the Applicant dated January 3, 2012 explains that the Applicant represents the Payee's estate. The requested Record was said to be required for Court proceedings.

On January 26, 2012, Justice provided the Applicant with a decision in response to his/her Application for Access to a Record, which provided as follows:

You are entitled to part of the records requested. However, we have removed some of the information from this record. The severed information falls under exemption provisions according to FOIPOP subsection 5(2).

*We refuse access to the severed parts of the records for [sic] **under the following FOIPOP Sections:***

*14 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft recommendations developed by or for a public body or a minister. **In this instance, the recommendation was about another issue not related to payment of support.***

*20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy. **This is a mandatory exception [sic] where personal information about a third party has to be withheld.***

[Emphasis added by Review Officer. Emphasis added. Where bolded and not italicized it is to delineate between the statutory

provisions cited and the explanation provided by Justice in its decision letter.]

On February 7, 2012 the Applicant filed a Request for Review on a Form 7. The covering letter from the Applicant read, as follows:

We request a review of the materials deleted from the running record between October 14, 2010 and November 29, 2010. The request was made by the Executor of the Estate of the late [Payee], who was the recipient of child support and at the time of [his/her] death there is a question as to whether support would remain payable by [the Payor]. It is therefore important that any information provided by [the Payor] to the Maintenance Enforcement staff be disclosed so that a determination can be made on that issue. This information is relevant to a motion to be made to the Supreme Court (Family Division).

The relevant facts for the purpose of this Review are as follows:

1. On May 16, 2013, I issued the Review Report *FI-12-62*. It raised these same issues regarding access to information provided to the Director of MEP arising in this Review. I found that MEP Records should not be processed by Justice under the *FOIPOP Act*. In accordance with s. 4A of the *FOIPOP Act*, all applicants with access requests for information received for the MEP Records should be directed by Justice to the Director of MEP and not processed under the *FOIPOP Act*.
2. Justice's response to my Recommendations in Review Report *FI-12-62* read as follows:

Further to your letter and decision dated May 16, 2012 [sic should read May 16, 2013] in relation to the above review, the Department of Justice has carefully reviewed your decision and what follows is the Department's decision regarding your recommendations.

*The Department will not be releasing a new decision to the Applicant nor do we agree that a separate policy or tool is required. **The Department respected the integrity, provisions and requirements of both acts and the Applicant received the information to which s/he was entitled.***

*Regarding recommendations 3 and 4, the Information Access and Privacy Office will review section of the IAP Administrator's Manual that discusses Section 4A of the *FOIPOP Act* to determine if it needs to be expanded or clarified. If after the review of the IAP Administrator's Manual the information Access and Privacy Office decides that changes are necessary to the manual, the Office will inform the IAP Administrators of the updates.*
[Emphasis added]

That decision letter essentially amounts to a non-decision because it fails to respond to the finding that the *MEA* is paramount and, therefore, access requests do not fall under the *FOIPOP Act*. Justice followed up on that response with a clear statement to the Review Office that it intended to continue to process access requests for information held by the Director of MEP under the *FOIPOP Act*.

3. Justice did not contact the Applicant in this Review or the Review Officer after *FI-12-62* was released with a view to revisiting its decision in this case.
4. At the outset of this Review, the Information Access and Privacy [“IAP”] Office of Justice conceded to the Review Office that *MEP* Records did not fall under the *FOIPOP Act*. When queried why it was processing the request under the *FOIPOP Act*, the IAP office stated that past practice under the Justice FOIPOP Coordinator was to ignore the provision in the *FOIPOP Act* that deems the *MEA* paramount and to process such requests under the *FOIPOP Act*. Justice indicated that it has continued to follow that practice. This position is curious given that it is the opposite of the position of Justice in *FI-99-04* in which it argued:
 - a. Were the Director of MEP to comply with a request under the *FOIPOP Act* s/he would be in violation of s. 32 of the *MEA*; and
 - b. Section 32 of the *MEA* overrides the access provision in the *FOIPOP Act*.

The Review Officer at the time agreed with Justice’s arguments and held that *MEA* was paramount to the *FOIPOP Act*. Subsequent to that decision, s. 4A of the *FOIPOP Act* was added which solidified the ruling with respect to *MEA* being paramount that Justice took in *FI-99-04* and that I took in *FI-12-62* and take in this Review.

5. Justice has a Privacy and Security Procedures Manual. Prepared and published by the Office’s, Information and Management Division, the purpose of the Manual is to address “*administrative and operational policy and procedures. It is intended for use by all Department of Justice staff.*” It lays out procedures with respect to responding to outside agencies such as the Auditor General. Some procedures apply to all divisions while others apply to specific divisions. The section dealing with the Legal Services Division contains a section devoted to *MEA*. After reciting the relevant provisions of the *MEA*, the manual provides the following direction to Justice employees:

Clause 4A(2)(j) of the FOIPOP Act notes that subsection 32(1) prevails over the FOIPOP Act, and information cannot be provided even if there were a FOIPOP application for it. Advise persons who inquire about the FOIPOP application process that there is an exclusion. Refer the person to the Justice Information Access and Privacy Administrator if they wish to discuss the matter further.

[Emphasis added]

6. Section 32 of the *MEA* requires information obtained by the Director of MEP to be kept confidential, except in certain circumstances. Primarily, the section provides that the information received by the Director under the MEP is to be kept confidential to protect the parties' privacy and is not to be disclosed except for the purpose of the *MEA* or to enforce a maintenance order. Pursuant to s. 33, it is an offence to violate s. 32 by releasing information in contravention of the *MEA*. The FOIPOP Administrator at Justice has no authority to process an access request under the *FOIPOP Act* regardless of whether s/he has consulted with the Director of MEP or not. Information held by the Director of MEP is not subject to the *FOIPOP Act*. By releasing confidential information in the MEP Records, the FOIPOP Administrator is not only exceeding her jurisdiction under the *FOIPOP Act*, but acting contrary to the law pursuant to s. 33 of the *MEA*.

Issues

1. Whether the responsive Record is wholly made up of information provided to the Director of MEP that falls under s. 32 of the *MEA*?
2. If the answer is yes, whether s. 32 of the *MEA* is paramount to the *FOIPOP Act* pursuant to s. 4A(2)(j)?
3. If yes, whether Justice erred by making a decision to process the Application for Access to a Record under the *FOIPOP Act*?
4. Whether Justice is in contravention of s. 4A of the *FOIPOP Act*, its own Privacy and Security Procedures Manual and s. 33 of the *MEA*?

Findings

1. I find that I have already made Recommendations directly on point in a recent Review Report, which Justice has chosen to refuse to follow. This will be the final time I will conduct an investigation at my office with respect to information held by the Director of MEP;
2. I find Justice's response to *FI-12-62* to be vague, unhelpful and based on an incorrect interpretation of the law. It failed to address the full complement of Recommendations with any specificity. In particular, it failed to respond to the finding that access requests involving information received by the Director of MEP **must be** processed under the *MEA* **and never processed** under the *FOIPOP Act*;
3. No information was provided by Justice in response to the previous Recommendations that would give me reason to change my findings in *FI-12-62*. I must find, once again, that Justice should not have processed this access request because information provided to the Director of MEP does not fall under the *FOIPOP Act* pursuant to s. 4A. In other words, the *MEA* prevails over the *FOIPOP Act*;
4. I find Justice is in contravention of the *FOIPOP Act* for processing this access request;

5. I find Justice did not have the legal authority to make a decision and process an access request under the *MEA* as only the Director of MEP can make that decision. Justice cannot unilaterally choose to divert access to information requests under the *MEA* and assume jurisdiction under the *FOIPOP Act*;
6. I find Justice is in contravention of its own Privacy and Security Procedures Manual; *and*
7. I find that if Justice continues:
 - a. to show a disregard to the paramountcy provision in the *FOIPOP Act*,
 - b. to refuse to refer access requests to the Director of MEP,
 - c. to ignore its own Privacy and Security Procedures Manual with respect to the *MEA*, *and*
 - d. to fail to comply with my Recommendations in Review Report *FI-12-62*

it will be in contravention of s. 33 of the *MEA*.

In Reviews where the law is well settled as in this case [Refer to BC Decision F10-12], I normally issue a Privately-Issued Letter Review Report. I have chosen *not* to conclude this Review with a Privately-Issued Letter Review Report because Justice is:

1. ignoring my Recommendations in *FI-12-62*;
2. contravening the *FOIPOP Act*;
3. disregarding its own Privacy and Security Procedures Manual, *and*
4. has indicated its intention to continue to process access requests for MEP information under the *FOIPOP Act*.

I find it necessary, therefore, to issue this public Review Report to re-affirm my Recommendations with respect to information provided to the Director of MEP. A public report is also necessary to address the following matters.

The IAP Division is part of Justice. The IAP Division is tasked with the duty to provide training to all FOIPOP Administrators throughout the provincial government. Justice has the opportunity to respond to my Recommendations, some of which are a repeat of those in *FI-12-62*. It is hoped that upon thoughtful deliberation, Justice will immediately take all necessary steps to correct how it manages matters related to information requests under the *MEA* and to show leadership in how s. 4A of the *FOIPOP Act* should be interpreted and followed.

If Justice fails to comply with the Recommendation with respect to changing its past and present practice, should I receive a Request for Review of a Record that is wholly made up of information provided to the Director of MEP, I will immediately move the Review from Intake to formal Review. This practice will be followed in all MEP cases involving s. 4A of the *FOIPOP Act*. A minimal public Review Report will be issued re-stating the law and posted on our website.

Because Justice is the department responsible for “all things legal” within government and is the provider of IAP support and training to all provincial departments, I find its response deeply troubling. The lack of receptivity by Justice to the previous Review Report *FI-12-62* and its failure to initiate a reconsideration of its decision to the Applicant in this case after the last Review Report about MEP is demonstrative of a systemic lack of respect for the expertise of the access and privacy oversight body appointed by the Legislative Assembly. My concern is that because Justice trains and provides guidance to other FOIPOP Administrators throughout government, it may be contaminating the system with its attitude of disrespect. Equally important is the need for Justice to exercise good judgment by recognizing when it has erred, acknowledge its error and take the necessary steps to correct it. Respect for the rule of law is not optional [Refer to *Roncarelli v. Duplessis*, [1959] S.C.R. 121].

Recommendations

1. Effective immediately upon acceptance of this Recommendation, Justice will change its past and present practice by:
 - a. complying with the *FOIPOP Act* in relation to access requests for information provided to the Director of MEP; **and**
 - b. committing to follow the direction provided in its Privacy and Security Procedures Manual with respect to processing access requests for information provided to the Director under the *MEA*.
2. Justice will issue a new decision to the Applicant, in line with this Review Report’s findings, that the *MEA* is paramount to the *FOIPOP Act* and in order to obtain access to information held by the Director of the MEP, the Applicant is to contact the Director of the MEP directly with their request for information. The new decision should include advice to the Applicant that the Director of the MEP makes her decision under tests provided for in s. 32 of the *MEA* and that the *FOIPOP Act* exemptions previously applied by Justice have no application to this access request as they do not apply under the *MEA*. This is to be done within 7 days of the acceptance of this Recommendation. A copy is to be provided to me at the same time;
3. Justice, as the department responsible for the training and day-to-day support of FOIPOP Administrators through the IAP office, will develop and publish a policy and/or tool with respect to conflicts between the *FOIPOP Act* and other enactments. That includes information that is restricted either pursuant to s. 4A of the *FOIPOP Act* or under an enactment with a notwithstanding clause. Justice is to provide a copy of this policy and/or tool to the Review Officer. This is to be done within 30 days of the acceptance of this Recommendation; **and**
4. Justice will incorporate the policy and/or tool into the *Nova Scotia FOIPOP Administrators Policy and Procedure Manual (2005)*, the FOIPOP Administrator basic training course, and any ongoing support and assistance it provides to

Administrators. This is to be done in time to be incorporated into the next training session after the acceptance of this Recommendation. Justice will provide me with the date of the next scheduled training and provide me with a copy of the pages amended to the training manual.

Respectfully submitted,

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

Attachment: Review Report *FI-12-62*