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

# REVIEW REPORT FI-12-106

**Report Release Date**: September 20, 2013

**Public Body**: Public Prosecution Service ["the PPS"]

**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The responsive Record, originally made up of over 2000 pages, was reduced to 343 pages with the consent of the Applicant. The Record consists of two separate prosecution files in the custody or under the control of the PPS:

1. The first file consists of a Record relating to the criminal proceedings, including: arraignment, preliminary hearing, arraignment and change of election, Supreme Court trial [Judge alone], and appeals to the Nova Scotia Court of Appeal and leave to appeal to the Supreme Court of Canada; and
2. The second part of the Record deals with an Application for the Mercy of the Crown made pursuant to s. 617 of the *Criminal Code of Canada* [*"Criminal Code"*].

**Issues in the Review**: The issues the Review Officer must decide are the following:

1. Whether the PPS has conducted a reasonable search for the responsive Record in accordance with s. 7 of the *Freedom of Information and Protection of Privacy Act* ["*FOIPOP Act*"].
2. Whether the PPS is required by s. 20 of the *FOIPOP Act* to withhold information because its disclosure would be an unreasonable invasion of a Third Party's privacy;

   or

   Whether the Applicant has met the burden of proof that Third Party personal information should be disclosed because such disclosure would not be an unreasonable invasion of a Third Party's privacy.

3. Whether the PPS is authorized to withhold information under s. 16 of the *FOIPOP Act* because the information is subject to solicitor-client privilege.

4. Whether the PPS is authorized to withhold information under s. 15(1)(f) of the *FOIPOP Act* because disclosure could reveal the exercise of prosecutorial discretion.

**Recommendations:**

I want to set the stage for the context in which I am making the Recommendations in this Review. I encourage the PPS to give serious consideration to the Recommendations in this Review Report with a view to demonstrating its own accountability. In the event the PPS elects to make a decision not to comply with my Recommendation with respect to release of the Record, I consider it important for both parties to be cognizant of what may happen should the Applicant decide to file an "appeal" to the Nova Scotia Supreme Court. I am concerned that if there is an "appeal" there may, in fact, be no remedy for the Applicant.

To initiate an appeal the Applicant must file a Form 10 with the Nova Scotia Supreme Court with the Review Report attached. While it has the advantage of having the Review Report, the Court has the discretion to hear the "appeal" by way of trial de novo. But there are limitations placed on what the Court can decide under the *FOIPOP Act.*

The Review Officer's power to exercise her discretion differently than the PPS is different from the Court in that it cannot replace its decision with respect to discretionary exemptions for that of the PPS. This is particularly important in cases such as this, where I have found that discretionary exemptions fit. Because I have found that the PPS did not exercise its discretion at all or exercised it in a manner inconsistent with the *FOIPOP Act*, **I have chosen, as I am empowered to do so by the *FOIPOP Act,* to make a decision based on the exercise of my discretion with a Recommendation to disclose.**

**The Court does not have the same power as the Review Officer when it comes to discretionary exemptions.** Where it finds that the discretionary exemption applies that is the end of the matter; the Court cannot then go on to examine if the PPS exercised its discretion appropriately because the Court cannot replace its decision in the case of discretionary exemptions unlike the Review Officer. If the Review Officer's Recommendations are rejected by the PPS, and the Court, on appeal, also finds the exemption applies, it cannot replace the PPS decision with respect to how a discretionary exemption ought to be applied and Order

disclosure [*Cummings v. Nova Scotia (Public Prosecution Service)*]. This means that the Applicant can never find a remedy under the *FOIPOP Act* unless the PPS follows the Review Officer's Recommendations.

I have thoroughly considered both the Applicant's and the PPS's Representations and all of the relevant evidence. The only conclusions I can reach are if the *FOIPOP Act* is not given the interpretation I have given it, specifically in relation to the limited and specific discretionary exemptions relied upon by the PPS, then the discretionary exemptions granted by the Legislature to the PPS are meaningless and an oversight model where the Review Officer/Commissioner lacks Order-making power ought to be abandoned.

In conclusion, I make the following Recommendations to the PPS:

1. I recommend that the PPS give disclosure by releasing the responsive Record to the Applicant including the Third Party personal information where it can reasonably expect that the personal information would already be known to the Applicant ***and*** where the personal information is necessary for a fair determination of the Applicant's rights. A copy of the responsive Records will be provided to the Applicant or, alternately, the PPS will permit the Applicant and his/her counsel to view the disclosed Record in its entirety and the PPS will provide copies of those documents the Applicant and his/her counsel wish to retain. This is to be done within 30 days of the acceptance of this Recommendation; and
2. I recommend the PPS develop a best practices policy that incorporates all of the factors listed in this Review Report that are potential relevant circumstances when exercising its discretion to make a decision under s. 15(1)(f) of the *FOIPOP Act.* In order to allow the PPS time to consider how best to incorporate the list of factors into its best practices, this is to be done within 60 days of the acceptance of this Recommendation.

**Key Words Considered**: age of the Record, all relevant circumstances, appeal, consent, conviction, criminal conviction review application, discretionary exemption, fair determination of the applicant's rights, litigation privilege, mandatory exemption, Mercy of the Crown, personal information, prosecutorial discretion, search, solicitor-client privilege, Third Party.

| | |
|---|---|
| **Statutes Considered:** | *Criminal Code of Canada s. 617 and 696.1 to 696.6; Nova Scotia Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 2, 5, 7, 15(1)(f), 16, 20, 39, 41(5), 42(1)(a), 42(6). |
| **Case Authorities Cited:** | *FI-07-60(M)*; *Donham v. Nova Scotia (Community Services)*, 2012 NSSC 384; *FI-00-53*; *FI-12-77*; *House, Re*, 2000, CanLII 20401 (NSSC); *FI-08-107*; *FI-09-29(M)*; BC Order *F12-08*; *FI-11-43*; *FI-07-72*; *FI-05-08*; *Blank v. Canada (Minister of Justice)*, 2006 SCC 39; *FI-08-107*; *Cummings v. Nova Scotia (Public Prosecution Service)*, 2011 NSSC 38(CanLII); *FI-06-79*; *O'Connor v Nova Scotia*, 2001 NSCA 132 (CanLII). |
| **Others Cited:** | *Regulations Respecting Applications for Ministerial Review - Miscarriages of Justice; PPS Statement of Mandate 2012-2013.* |

# REVIEW REPORT FI-12-106

## Background

On April 13, 2012, the Agent for the Applicant ["the Applicant"] made an Application for Access to a Record under the *Freedom of Information and Protection of Privacy Act* ["*FOIPOP Act*"] to the Public Prosecution Service ["PPS"], the text for which is contained in the decision letter reproduced below.

The Application for Access to a Record was for the same Record sought by the Applicant in 2009. While the PPS did not conduct a new search, it did provide notice again to Third Parties who had not consented to disclosure of their personal information during the Applicant's earlier Access Requests. One of the Third Parties provided their consent and their personal information was disclosed to the Applicant.

On June 18, 2012, the PPS provided the Applicant with a decision in response to his/her Application for Access to a Record, which provided as follows [typographical errors in the original]:

> *Your application for access under the Freedom of Information and Protection of Privacy Act was received at this office on April 19, 2012. In your request you asked for –*
>
> *"all crown and police files electronic and otherwise relevant to the investigation and conviction of R.v. [Applicant] including but not limited to":*
>
> *a) All post conviction disclosure.*
> *b) All police statements and reports pre and post conviction.*
> *c) All statements provided by [Named Third Party / Victim] subsequent to the initial statements provided by [him/her].*
> *d) All information relating to the whereabouts of all exhibits of the trial, including required destruction orders accompanying those exhibits.*
> *e) All affidavits provided by witnesses of the trial.*
>
> *In 2009, your made two separate application for access to the following files:*
>
> *1. R .v. [Applicant]*
> *2. Application for the Mercy of the Crown Sec. 617*
>
> *In application [file number], a duplicate of the material that was released to you in 2009 is enclosed. Within those records you will find duplication of third party records where consent to disclose was provided in 2009. Those individuals were not re-contacted when the current application was processed. In 2012, (a second) letter was sent to third parties who did not consent to disclosure of their information in 2009 or who did not reply to the request. As of today's date, consent has been received from one additional individual – [Named Third Party]. Should additional third-party consent letters arrive after this date, the related documents will be provided to you.*
>
> *The FOIPOP Act permits limited and specific exemptions. Exemption to disclosure under Section 20 is a mandatory exemption, unless a third party consents to the disclosure" - Sec. 21(4). Some other exemptions to disclosure in the Act are discretionary(e.g., Section 15).*

*You are being provided with additional disclosure of some of the records that were withheld in 2009 under Section 15(1)(f). The personal information in the documents has been "blackened out" under the mandatory Section 20 exemption clause.*
*(Please note that there are other documents in the files that are being withheld under Section 15(1)(f).*

*Some third-party information that may already be known to you has been severed. This is because the FOIPOP Act must protect personal privacy at the same time that it promotes access to information. Therefore a balance must be achieved between an Applicant's right to access and the right of third parties to have their personal information treated privately to protect their identities and reputations.*

*It is generally accepted that the risk of a breach of third-party privacy grows as the circulation of a document grows. To limit the potential for inadvertent circulation of third-party information, names and other identifiers have been removed from some of the documents, while still providing you with information to which you are entitled, under the Act.*

*In response to your specific access request please be advised that there are no electronic records in the files.*

*a) Re: All post conviction disclosure*

*Assuming that you are describing information compiled by [Name of Solicitor](who represented [Named Third Parties]), information collected by police and others, additional material is enclosed, - excluding some documents where an exemption has been claimed under Section 15 and /or Section 20 of the Act.*

*b) Re: All police statements and reports pre and post conviction*

*Some police statements (e.g., [named officers]'s have been released - other police notes have been withheld under Section 15 and / or Section 20 of the Act.*

*c) Re: All statements provided by [Named Third Party / Victim] subsequent to the initial statements provided by [him/her].*

*Records pertaining to [Named Third Party / Victim] are being withheld under Section 20 of the Act [Named Third Party / Victim] refused to provide consent to disclosure of [his/her] personal information in the files in 2009 and in 2012.*

*d) Re: All information relating to the whereabouts of all exhibits of the trial, including required destruction orders accompanying exhibits.*

*In addition to information regarding exhibits in the public record (trial transcript), there is one document in the file that was not released to you in 2009 regarding the whereabouts of exhibits/ specifically the "slides." The content of the document / report was provided to [a named lawyer] by [the Deputy Director of PPS] on Aug. 25, 2009. In [the Deputy Director]'s correspondence to [a named lawyer] dated August 25, 2009, [the Deputy Director] also confirmed that there are no slides in the PPS file material. A copy of the letter is being provided for ease of reference. The one page "report" is also enclosed with an exemption under Sec. 20 of the Act.*

*There is no documentation regarding authorization for destruction of exhibits in the PPS files The Public Prosecution Service does not have the authority to destroy exhibits since the police and the courts are custodians of exhibits.*

*e) Re: All affidavits provided by witnesses of the trial.*

*Affidavits have been released where consent to disclose has been provided by third parties. Affidavits are being withheld under Section 20 where consent for release was not obtained.*

*You are entitled to part of the records requested. Some information has been removed from the record because it falls under exemption provisions according to subsection 5(2) of the Act. You have not been given access to certain complete documents in the files and / or severed parts of the records pursuant to the following sections of the Act:*

*Section 15(1) - The head of a public body may refuse to disclose to an applicant information that could reasonably be expected to*

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

*Section 16 - The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege. 1993, c. 5, s. 16 .*

*Section 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.*

*(2) - 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*

> *(2)(h) - disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant*
>
> *(3)(a) - the personal information relates to a medical, dental, psychiatric, psychological or other health care history, diagnosis, condition, treatment or evaluation*
>
> *(3)(b) - the personal information was complied [sic] and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;*
>
> *(3)(f) - the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;*

The decision refers to two separate Access Requests made to the PPS in 2009. The letter explains that Third Party consultations were undertaken in response to the most recent request resulting in additional disclosure of information previously withheld under the *FOIPOP Act* because one of the Third Parties had provided his/her consent to disclose.

On August 17, 2012, the Applicant filed a Request for Review. When it received notification that a Request for Review had been filed, the PPS informed the Review Office that the Applicant had also filed an appeal with the Supreme Court of Nova Scotia. The PPS filed a Motion to Strike the appeal filed with the Supreme Court. Pending the outcome of that Motion to Strike, the PPS advised the Applicant to file a Review Request with this Office in order to preserve his/her right to request a Review with the Review Officer.

The Review Office wrote to the Applicant on September 26, 2012 to acknowledge receipt. The Applicant was advised that his/her Review Request had been screened out by our office because s/he had proceeded by direct appeal to the Supreme Court. The *FOIPOP Act* prohibits an Applicant from pursuing an appeal to the Supreme Court and file a Request for Review to the Review Officer at the same time. The Applicant was advised that should his /her direct appeal be dismissed, a Request for Review would be accepted late, as the Review Officer has the discretionary power to accept late Request for Reviews.

On November 15, 2012, the Applicant filed a new Request for Review. The Form 7 was accompanied by a cover letter, which was accepted as the first Representation from the Applicant. The Applicant requested that the cover letter be held in confidence and withheld from the PPS.

On November 28, 2012, the Review Officer, as promised, approved a request for an extension of time to accept the late filing of a Request for Review, and an accompanying request to expedite the Review. On December 17, 2012 the Review Officer also accepted the informal request from the Applicant to accept the covering letter as a Representation on an *in-camera* basis. The Applicant called on December 19, 2012 to clarify that the Representation was to remain confidential so that the PPS did not have the information at the outset. The Representation has since been shared, with the Applicant's consent, as part of the Review process where the Review Officer facilitates an exchange of Representations between the parties.

**Record at Issue**

The responsive Record, made up of over 2000 pages, consists of two separate prosecution files in the custody or under the control of the PPS:

1. The first file consists of a Record relating to the criminal proceedings, including: arraignment, preliminary hearing, arraignment and change of election, Supreme Court trial [judge alone], and appeals to the Nova Scotia Court of Appeal and leave to appeal the Supreme Court of Canada; and
2. The second part of the Record deals with an Application for the Mercy of the Crown made pursuant to s. 617 of the *Criminal Code of Canada* [*"Criminal Code"*].

The PPS prepared two Indexes of the Record. Each Index identifies the documents by tab number and includes a description of each document and exemptions applied by PPS in reaching its decision.

The responsive Record is an exact duplicate of the responsive Record that was prepared by the PPS in response to the Applicant's 2009 Access Requests.

On May 7, 2013 the Applicant, after s/he had an opportunity to review the Indexes of the Record, provided a Representation in which s/he narrowed the scope of the request by identifying the documents of primary interest. The responsive Record under formal Review consists of 343 pages.

Parts of the Record at issue in the Review were not legible. On request during the formal Review, the PPS provided me with the originals. I have reviewed the Record at issue in its entirety.

**Issues in the Review**

The issues the Review Officer must decide are the following:

1. Whether the PPS has conducted a reasonable search for the responsive Record in accordance with s. 7 of the *FOIPOP Act*.
2. Whether the PPS is required by s. 20 of the *FOIPOP Act* to withhold information because its disclosure would be an unreasonable invasion of a Third Party's privacy.

   or

   Whether the Applicant has met the burden of proof that Third Party personal information should be disclosed because such disclosure would not be an unreasonable invasion of a Third Party's privacy.
3. Whether the PPS is authorized to withhold information under s. 16 of the *FOIPOP Act* because the information is subject to solicitor-client privilege.
4. Whether the PPS is authorized to withhold information under s. 15(1)(f) of the *FOIPOP Act* because disclosure could reveal the exercise of prosecutorial discretion.

**Discussion**

Section 5 of the *FOIPOP Act* gives the Applicant a right of access to any Record in the custody or under the control of a public body. Section 2 outlines the purpose of the legislation, which is, in part:

> *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,*
>
> *(iii) permit the airing and reconciliation of divergent views.*

The Applicant was tried and convicted of a serious criminal offence in the late 1970's. The Applicant maintains his/her innocence. All avenues of appeal were exhausted, and an Application for the Mercy of the Crown pursuant to s. 617 of the *Criminal Code of Canada* [*Criminal Code*] was filed. The Applicant is pursuing the information in the Record in order to bring the matter forward to be recognized as a victim of an alleged miscarriage of justice.

In 2009, the Applicant sought access to all Records held by the PPS related to the criminal proceedings and the Application for the Mercy of the Crown. S/he did not appeal or file a Request for Review of the disclosure decisions made in 2009. The Applicant subsequently applied to the Supreme Court of Nova Scotia to obtain all Records and evidence relating to all the investigations. The Supreme Court dismissed the application on a technical matter.

The Applicant intends to file a Criminal Conviction Review ["CCR"] application under the *Criminal Code*. The Applicant believes that s/he is entitled to full disclosure for this purpose and intends to do whatever is necessary in order to obtain full disclosure.

The right to seek a CCR is established pursuant to s. 696.1 to 696.6 of the *Criminal Code.* The provisions are intended to provide legal redress for those who believe that they were wrongfully

convicted. The application process itself has been formalized by Regulation. A CCR application must be accompanied by specified documents in order for the CCR application to be considered. The burden is on the Applicant to provide the requisite documentation as part of filing the CCR application. In many cases, applicants or the courts may already possess the necessary documentation. However, in this case, the Applicant believes that the PPS has exclusive custody or control of the Record made up of the evidence s/he considers necessary for the CCR application.

One may ask oneself why an Applicant would stir up the history of this matter long after a conviction and sentence have been concluded. This is a question that the PPS should have considered. The Deputy Director of the PPS, in fact, advised the Applicant to make a FOIPOP request well aware of the fact of why the Applicant wants the information. In this case, the reason behind the Application for Access to a Record is a relevant factor the PPS should have considered in exercising its discretion, taking into account all relevant circumstances and, in particular, a determination of the Applicant's rights.

**Findings**

**Reasonable Search**

1. A good part of the investigation was consumed by the Applicant's interest in specific Records - the exhibits [slides] relevant to the criminal proceedings. S/he purported that these should be part of the Record in the custody or under the control of the PPS. The Applicant argued that if that information was not in its custody or control, the PPS ought to make it available by it conducting an intense search of other agencies and the Courthouse archives. In regards to the question of search, I make the following findings:

    a. On review of the Representations from the PPS, I find the PPS met its duty to assist pursuant to s. 7 of the *FOIPOP Act* with respect to conducting a reasonable search [NS Report *FI-07-60(M)*]. I find that the PPS has produced the complete responsive Record to the Review Officer.

    b. I find the Applicant failed to meet the burden, as laid out in previous Review Report *FI-07-58*, to demonstrate that the PPS had failed to produce the complete responsive Record. The Applicant did not provide any evidence that the exhibits [slides] – as a Record – were ever in the custody or under the control of the PPS other than his/her claim it ought to have been. Mere speculation on the part of the Applicant will not suffice [*Donham v. Nova Scotia (Community Services),* 2012 NSSC 384; NS Report *FI-00-53*].

    c. I find, therefore, the issue of whether the PPS has followed its own destruction of documents policy to be irrelevant.

    d. I find the *FOIPOP Act* and the Access regime does not require a public body to prove with absolute certainty that no additional Records exist [NS Report *FI-12-77*]. Nor does it contemplate one public body doing an intense "scavenger hunt" of other agencies who may have custody or control of the information sought, at the behest of an applicant. As the Applicant in this case was advised, it is incumbent on an applicant to make separate applications for access to the other

agencies that are subject to access to information legislation if s/he believes that agency may have all or part of the Record sought and cannot expect the PPS to do that search for him/her.

**Personal Information Exemption**

2. The test for determining whether or not to disclose personal information is an unreasonable invasion of privacy of a Third Party has been established by the Nova Scotia Supreme Court of Nova Scotia [*House, Re, 2000, CanLII 20401 (NSSC)*]. The Review Officer has consistently followed this four-step test when determining the application of this exemption [NS Reports *FI-08-107* and *FI-09-29(M)*].

   The "*House* test" is as follows:

   1. *Is the requested information "personal information" within the definition? If not, that is the end. Otherwise, go on.*
   2. *Are any of the conditions of s. 20(4) satisfied? If so, that is the end. Otherwise, go on.*
   3. *Is the personal information presumed to be an unreasonable invasion of privacy pursuant to s. 20(3)?*
   4. *In light of any s. 20(3) presumption, and in light of the burden upon the Applicant, does the balancing of all relevant circumstances, including those listed in s. 20(2), lead to the conclusion that disclosure would constitute an unreasonable invasion of privacy or not?*

   A recent case involving the equivalent section [s. 22] in British Columbia, discussed a similar test for determining whether disclosure would be an unreasonable invasion of privacy as follows:

   > *First, the public body must determine if the information in dispute is personal information. If so, it must consider whether any of the information meets the criteria identified in s. 22(4), in which case disclosure would not be an unreasonable invasion of third-party personal privacy and s. 22(1) would not apply. If s. 22(4) does not apply, the third step for the public body is to determine whether disclosure of the information falls within s. 22(3), in which case it would be presumed to be an unreasonable invasion of third-party privacy. If the presumption applies, it is necessary to consider whether or not the presumption has been rebutted by considering all relevant circumstances, include those listed in s. 22(2).*
   >
   > *[BC Order F12-08]*

   With respect to the PPS's reliance on the s. 20 exemption, I make the following findings:

   a. I find the PPS erred in its interpretation of the test in s. 20 of the *FOIPOP Act*. My analysis following the *House* test are as follows:

i. I find the portion of the Record severed under s. 20 falls within the definition of personal information.

ii. I find that none of the conditions in s. 20(4) apply because the affected Third Parties have not consented.

iii. While it listed a subsection of s. 20(4), I find no evidence that the PPS actually followed through with the *House* test. The PPS limited itself to only one relevant consideration: if it was able to obtain the consent of the Third Party, in deciding whether or not personal information could be disclosed. By doing so, the PPS essentially deferred its responsibility under s. 20 to the Third Parties [NS Report *FI-11-42*]. If consent has been provided by a Third Party then s. 20(4) applies and disclosure is deemed not to be an unreasonable invasion of privacy and that is the end of the analysis. The PPS appears to have constructed a different kind of analysis than provided for in the *House* test – if consent is not given by a Third Party then it falls under a presumption. That is incorrect. The presumption is established by s. 20(3) not the negative of what is listed in s. 20(4).

iv. I find the personal information falls under the presumption, under s. 20(3), because it falls within the categories listed in the subsections.

v. I find in light of the fact that the presumption in s. 20(3) applies, the burden shifts to the Applicant.

vi. I find the Applicant has met his/her burden to provide evidence of relevant circumstances sufficient to rebut the presumption under s. 20(2) and, in particular, the fact s/he has demonstrated that the information is required to make his/her CCR application.

> *20(2) In determining…whether a disclosure of personal information constitutes an unreasonable invasion of privacy, the head of a public body* ***shall consider all the relevant circumstance****, including whether*
>
> *(c) the personal information is relevant to a fair determination of the applicant's rights.*
>
> ***[Emphasis added]***

I find the information withheld under s. 20 is relevant in order for the "fair determination of rights" of the Applicant.

vii. I find the PPS failed in its duty to consider **all relevant circumstances** pursuant to s. 20(2) of the *FOIPOP Act*. When a public body considered whether or not to disclose personal information of a Third Party knowing why an applicant wants access to the Record may be a relevant circumstance. In this case, the PPS was well aware the Applicant wanted all information in order to be recognized as a victim of an alleged miscarriage of justice. The Applicant has made numerous attempts to seek justice with respect to his/her alleged "wrongful" conviction. The PPS is aware of this. In fact, prior to making its decision, the Deputy Director of the PPS counselled the Applicant to make his/her 2012 Access Request under the *FOIPOP Act* in order to

obtain the information for the CCR application. I find that the PPS failed to consider all relevant circumstances into account and, in particular, the evidence provided by the Applicant that the personal information is relevant to a fair determination of the Applicant's rights. Had it done so, it is reasonable to conclude that the PPS would have decided that the disclosure would not constitute an unreasonable invasion of any Third Party's privacy. I find that because the information is for a CCR application which is for a determination of rights, this factor should be given more weight than other factors that favour non-disclosure.

viii. I find all the proceedings involving this criminal matter were highly publicized and thus disclosure of the personal information of those referred to in the Record would not be an unreasonable invasion of any Third Party's privacy. Certainly the names of the Third Parties are well known to the Applicant. I find this is a prime example of when the right of access of one party must be balanced against the right of privacy of another. To refuse the former based on the latter when much of the Third Party information is in the public realm and known to the Applicant leads to an absurd result [NS Report *FI-07-72*].

ix. The privacy rights of Third Parties are an important consideration in an access request under the *FOIPOP Act*. But these must always be balanced with the right of access to information of the Applicant. In a situation where some of the personal information may be known to the Applicant, is a matter of public record and is necessary for a fair determination of the Applicant's rights, I find the PPS should consider the latter a predominant relevant circumstance and err on the side of exercising its discretion to disclose.

x. The PPS erred when it took an irrelevant circumstance into account, which is referred to in its decision letter as follows:

> *It is generally accepted that the risk of a breach of third-party privacy grows as the circulation of a document grows. To limit the potential for inadvertent circulation of third-party information, names and other identifiers have been removed from some of the documents, while still providing you with information to which you are entitled, under the Act.*

Despite the PPS referring to this as a "generally accepted" principle or position, it failed to provide any supporting evidence, explanation or jurisprudence to support its assertion.

A public body must provide actual proof and not merely speculate about an applicant's intentions in order to withhold a Record. I find that the PPS did not produce any evidence or explanation or jurisprudence to support the idea that the Applicant intended for "inadvertent circulation" of the Third Party information. I find the PPS erred when it merely speculated about the circulation of the Record and, in doing so, relied on an irrelevant consideration in these circumstances.

**Solicitor-Client Privilege Exemption**

3. The solicitor-client privilege exemption has two branches: litigation and communication privilege. The bubble of protection that surrounds the litigation part of solicitor-client privilege is finite unlike its sister communication privilege.

   In regards to the PPS's application of the discretionary exemption of solicitor-client privilege, I make the following findings:

   a. I find that the PPS did not make a clear distinction between the two branches of solicitor-client privilege. As such, I have reviewed the Record and applied the tests associated with each branch of the exemption.

   b. I find the PPS Representations adequately demonstrated that the information falls within the definition of communication privilege, as laid out in previous Review Report *FI-05-08*. Keeping in mind, however, that the exemption is discretionary, the mere fact that the information falls within the definition of privileged is not a sufficient basis to withhold. The PPS provided no details as to how it exercised its discretion to refuse Access. On that basis, I find the solicitor-client exemption should not apply and the information should be disclosed.

   c. The PPS claimed that litigation privilege did not apply. I disagree. Most of the information the PPS claimed fell under communication privilege can more appropriately be characterized being subject to the litigation branch, as laid out in previous Review Report *FI-08-104*. Given the facts in this case: the fact that all prosecutions, trials, appeals, convictions, pardons were all completed over three decades ago, I find litigation privilege expired long ago and therefore the information must be disclosed [*Blank v. Canada (Minister of Justice)*, 2006 SCC 39].

**Prosecutorial Discretion Exemption**

4. The *FOIPOP Act* makes two provisions with respect to prosecutorial discretion. The first is s. 4(2)(i) which provides for when information should be excluded from the operation of access to information legislation. This ***exception*** reads as follows:

   *Notwithstanding subsection (1),* ***this Act does not apply to***

   *(i) A record relating to a prosecution* ***if all proceedings in respect of the prosecution have not been completed****;*

   ***[Emphasis added]***

   The second provision is s. 15(1)(f) which provides for a discretionary exemption with respect to Records that were considered in the exercise of prosecutorial discretion, but can be disclosed at the discretion of the PPS where the prosecution is concluded. This ***exemption*** reads as follows:

   *The head of a public body* ***may refuse to disclose*** *information to an applicant if the disclosure could reasonably be expected to…*

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

***[Emphasis added]***

If the Legislature had intended the concluded prosecution records to be excluded from the operation of the *FOIPOP Act* in all cases, like those of ongoing prosecutions, the exclusion would have identified both scenarios. It does not. The Legislature chose however, to make the **concluded** prosecution records subject to a discretionary exemption. This means it anticipated that, like all other discretionary exemptions, the exercise of discretion would de facto be applied only in limited and specific instances.

To be clear, as the Review Officer, I would ***always*** respect that ongoing prosecution records are excluded from the operation of the *FOIPOP Act*, and would never interfere with that exclusion other than to confirm there is an actual prosecution underway. The Record in this Review relates to a concluded prosecution and therefore is subject to the *FOIPOP Act.*

There is no definition for prosecutorial discretion in the *FOIPOP Act.* The Nova Scotia Supreme Court has adopted, for the purpose of our legislation, the definition provided for in its counterpart in British Columbia [*Cummings v. Nova Scotia (Public Prosecution Service), 2011 NSSC 38 (CanLII)*].

I make the following findings with respect to the refusal to disclose information withheld by the PPS under the prosecutorial discretion pursuant to s. 15(1)(f) of the *FOIPOP Act*:

a. In its Representations, the PPS discussed prosecutorial discretion at length. The question it appears to have asked itself is "was the Record the information the prosecutor considered in exercising his/her discretion?" The PPS answered this question as "yes", which is correct, but for the PPS that was the end of the matter. I find the next question it should have asked is "what are all of the relevant factors ***the PPS should consider in exercising its discretion*** to decide whether information should be disclosed or withheld?"

b. I find in this Review that the PPS has treated the discretionary exemption as if it were a mandatory exemption. The PPS by its own Representations clearly erred on the side of caution to withhold but with no explanation as to why or how.

c. Where a public body, as in this case, fails to provide any explanation as to how its discretion has been exercised, I find it has not exercised its discretion at all, which is a fundamental error under the statute [NS Report *FI-06-79*].

d. In order to achieve the goal of accountability, the PPS must provide reasons and clarification as to why the information must be withheld. When it simply claims the information falls under prosecutorial discretion and then applies it to sever the Record with no further analysis of how it applied its discretion, I find the PPS has erred in its interpretation of s. 15(1)(f) of the *FOIPOP Act*. By treating public prosecutorial information as if it fell under a mandatory exemption amounts to applying it as a blanket exemption rather than as the Legislature intended, as a ***limited and specific*** discretionary exemption [*O'Connor v. Nova Scotia*]. Blanket exemptions are contrary to a public body's duty to assist and the purposes of the

*FOIPOP Act*. To permit this kind of application of discretionary exemptions by the PPS will render citizens' right of access to information meaningless.

e. In the event that I am wrong and the PPS did exercise its discretion based on factors that they did not make known to me, I find the PPS should have exercised its discretion differently. In the recent *Cummings v. Nova Scotia (Public Prosecution Service)* case, the Court stated:

> *If the court finds that a record falls within an exemption, the court shall not order the public body to give the applicant access to the record (regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record).*

The Court is correct in restricting its own powers to what is set out in s. 42(6) of the *FOIPOP Act,* which provides as follows:

> *Where the Supreme Court finds that a record falls within an exemption, the Supreme Court shall not order the head of the public body to give the applicant access to the record, regardless of whether the exemption requires or merely authorizes the head of the public body to give access to the record.*

The legislation makes no such restriction on the Review Officer. Her power on completing a Review is found in s. 39 of the *FOIPOP Act,* which provides as follows:

> *(1)On completing a review, the Review Officer shall*
>
> *(a) prepare a written report setting out the Review Officer's recommendations with respect to the matter and the reasons for those recommendations;*
>
> . . .
>
> *(2) In the report, the Review Officer* ***may make any recommendations with respect to the matter under review that the Review Officer considers appropriate.***
>
> ***[Emphasis added]***

The broader latitude granted to the Review Officer enables me to recommend disclosure based on me exercising my discretion under a discretionary exemption differently than the public body to ensure the decision is consistent with how the exemption ought to have been applied.

The Court, in the *Cummings v. Nova Scotia (Public Prosecution Service)* case, held that once it determined that s. 15(1)(f) applied it had no choice but to find the PPS was justified in withholding the information from disclosure. It was not open to the Court to consider how the PPS exercised its discretion to apply the exemption because the Court has no power to replace the decision of the PPS. That interpretation does not apply to the PPS. In a Review, I must take into account how the PPS exercised its discretion and whether or not it applied the exemption correctly. If not, I may exercise my discretion in accordance with how the legislation applies to the Record.

f. Unlike other sections of the legislation, s. 15 makes no reference to the age of the information in a Record. Sections where the statute makes reference to age are:

- s. 12(3) - 15 or more years for "inter-governmental"
- s. 13(2)(a) - 10 years for "Executive Council [Cabinet]"
- s. 14(3) - 5 years for "Advice to a Minister"
- s. 19A - 15 years for "Closed Meetings"
- s. 30(c) - 20 years for "Archived personal information of a deceased person"

These provisions dictate to public bodies that they must not rely on that particular discretionary exemption if the Record falls within the years specified. For example:

> *12(3) Subsections (1) and (2) do not apply to information in a record that has been in existence for fifteen or more years.*

This is when a public body must provide disclosure based on age and cannot use an exemption to withhold. I find, however, that the age of a Record may also be a relevant factor for public bodies to consider in making a decision when applying a discretionary exemption even though it is not included as it is in other exemptions. Given the information in the Record is more than 30 years old, I find the age of the Record to be an appropriate factor the PPS ought to have considered in exercising its discretion to disclose or withhold the information.

g. I find the following are the kinds of appropriate factors to be considered in exercising discretion under s. 15(1)(f) of the *FOIPOP Act.* I offer this non-exhaustive list as a helpful guide for future Access Requests as some of the relevant factors that should be considered by the PPS that may assist in determining whether or not to exercise its discretion to disclose the Record:

i. Is there evidence that the PPS has given greater emphasis to the protections afforded to prosecutorial discretion rather than the Applicant's right of Access to a PPS Record under the *FOIPOP Act*? In other words, is there any evidence that the PPS is mistaking the legal protection afforded to prosecutorial discretion to withhold information with the purpose of the discretionary exemption under the *FOIPOP Act* to disclose information?

ii. To what extent will disclosure of the Record in fact reveal ***how*** prosecutorial discretion was exercised versus simply disclosing information contained in the Record that was used/considered by the Prosecutor?

iii. Is there evidence the PPS considered the Applicant's statutory right of access to information?

iv. Is there evidence the PPS considered the right to privacy of any Third Parties such as victims or witnesses?

v. Is there evidence that disclosure of the personal information would or would not be an unreasonable invasion of a Third Party's privacy?

vi. To what extent is the personal information of Third Parties already known to the Applicant and/or in the public realm as a result of the criminal proceedings?

vii. Has the PPS approached all of the Third Parties, including victims and witnesses, and asked for their consent for the disclosure of their personal information?

viii. Has the PPS reviewed the Record line-by-line to see if any information can be disclosed? If not, does its reliance on s. 15(1)(f) amount to a blanket application of a discretionary exemption as though it were blanket mandatory exemption, or as some refer to as a "class exemption"?

ix. Is there evidence the PPS has considered irrelevant considerations in making its decision to withhold?

x. Is there evidence that the Applicant requires the Record for another judicial or administrative process that has a mandate to make a fair determination of rights?

xi. Has the Applicant pursued and/or exhausted other avenues in order to obtain the information s/he believes to be contained in the Record?

xii. Is there evidence that the Applicant has been advised to use the *FOIPOP Act* process? If so, by whom? Does this include the PPS itself?

xiii. Is the *FOIPOP Act* process the "last hope" remedy for the Applicant to obtain access to the information contained in the Record?

xiv. How old is the PPS Record?

xv. How long has it been since the prosecution was completed and any subsequent appeals exhausted?

xvi. What is the history or record of when the PPS does disclose or has disclosed similar information in compliance with the *FOIPOP Act*?

xvii. Is the decision with respect to the Record consistent with the vision of the PPS "to seek justice and serve the public interest by performing prosecution duties with fairness, professionalism and integrity"? [PPS Statement of Mandate 2012-2013]

xviii. Will the goal of the *FOIPOP Act* to hold the PPS accountable more likely be met by exercising its discretion to disclose rather than withhold?

xix. Is there any evidence that the PPS is using a discretionary exemption to shield itself from the goal of accountability under the *FOIPOP Act* by simply refusing to exercise its discretion?

xx. Will the PPS's decision to withhold the Record place itself in an actual or ostensible conflict of interest? In other words, could the PPS's refusal to provide access to the Record be construed as self-serving or protecting its own interests rather than serving the interests of access to information?

xxi. Has the PPS taken into account whether or not there is any public interest in releasing the Record to the Applicant?

**Highlighted Relevant Factors**

e. I find the following are all the relevant circumstances I have considered in inserting my own exercise of discretion under s. 15(1)(f) of the *FOIPOP Act*, relying on the factors listed above that are relevant in this Review:

i. The Applicant has indicated that the reason s/he requires the information in the Record is because s/he intends to make an application to the federal CCR. In his/her pursuit of a fair determination of his/her rights, the Applicant requires access to all the information available.

ii. The Applicant has attempted and exhausted all available avenues to obtain the information contained in the Record including two prior Access Requests to the PPS [2009], application for access to information to a health authority, search request to Nova Scotia Supreme Court Retention Clerk in 2011, and an application to Nova Scotia Supreme Court for Order to Locate and Preserve in 2012.

iii. When filing a CCR application, it must be accompanied by specific documents before the application will activate and be given an initial assessment. The Applicant is seeking disclosure from the PPS in order to meet this requirement and thereafter the CCR investigation takes place.

iv. The Applicant was told through its counsel in 2009 and again was advised by the Deputy Director of the PPS on August 25, 2009 to make an access request for the information.

v. The opportunity to apply for a CCR is dependent on documents that are held by the very public body responsible for making decisions in the past about a prosecution and appeal.

vi. All proceedings with respect to the prosecution of the Applicant that are the subject of the Access Request have been completed and there is no possibility of appeal or any pending criminal proceedings.

vii. Other than the process of CCR for which the Record is sought, the Applicant has exhausted all other remedies including Mercy of the Crown proceedings that could result in a "fair determination of rights."

viii. The Record is more than 30 years old.

ix. The PPS attempted to contact the Third Parties to obtain their consent for disclosure of personal information. Some of the Third Parties consented to the disclosure of their personal information.

x. The original criminal trial, conviction and appeals were highly publicized and though three decades have passed, the information about the matter is widely available on the web. In these circumstances Third Parties would have little expectation of privacy.

xi. Some of the personal information contained in the Record is known to the Applicant as a result of the criminal trial, conviction and appeals. For the PPS to withhold this information from the Applicant leads to an absurd result. One third party was the informant (victim) who signed the Information to pursue a prosecution, whose identity is a matter of public record and is known to the Applicant.

**Recommendations**

I want to set the stage for the context in which I am making the Recommendations in this Review. I encourage the PPS to give serious consideration to the Recommendations in this Review Report with a view to demonstrating its own accountability. In the event the PPS elects to make a decision not to comply with my Recommendation with respect to release of the Record, I consider it important for both parties to be cognizant of what may happen should the Applicant decide to file an "appeal" to the Nova Scotia Supreme Court. I am concerned that if there is an "appeal" there may, in fact, be no remedy for the Applicant.

To initiate an appeal the Applicant must file a Form 10 with the Nova Scotia Supreme Court with the Review Report attached. While it has the advantage of having the Review Report, the Court has the discretion to hear the "appeal" by way of trial de novo. But there are limitations placed on what the Court can decide under the *FOIPOP Act.*

The Review Officer's power to exercise her discretion differently than the PPS is different from the Court in that it cannot replace its decision with respect to discretionary exemptions for that of the PPS. This is particularly important in cases such as this, where I have found that discretionary exemptions fit. Because I have found that the PPS did not exercise its discretion at all or exercised it in a manner inconsistent with the *FOIPOP Act*, **I have chosen, as I am empowered to do so by the *FOIPOP Act,* to make a decision based on the exercise of my discretion with a Recommendation to disclose.**

**The Court does not have the same power as the Review Officer when it comes to discretionary exemptions.** Where it finds that the discretionary exemption applies that is the end of the matter; the Court cannot then go on to examine if the PPS exercised its discretion appropriately because the Court cannot replace its decision in the case of discretionary exemptions unlike the Review Officer. If the Review Officer's Recommendations are rejected by the PPS, and the Court, on appeal, also finds the exemption applies, it cannot replace the PPS decision with respect to how a discretionary exemption ought to be applied and Order disclosure [*Cummings v. Nova Scotia (Public Prosecution Service)*]. This means that the Applicant can never find a remedy under the *FOIPOP Act* unless the PPS follows Review Officer's Recommendations.

I have thoroughly considered both the Applicant's and the PPS's Representations and all of the relevant evidence. The only conclusions I can reach are if the *FOIPOP Act* is not given the interpretation I have given it, specifically in relation to the limited and specific discretionary exemptions relied upon by the PPS, then the discretionary exemptions granted by the Legislature to the PPS are meaningless and an oversight model where the Review Officer/Commissioner lacks Order-making power ought to be abandoned.

In conclusion, I make the following Recommendations to the PPS:

1. I recommend that the PPS give disclosure by releasing the responsive Record to the Applicant including the Third Party personal information where it can reasonably expect that the personal information would already be known to the Applicant ***and*** where the personal information is necessary for a fair determination of the Applicant's rights. A copy of the responsive Record will be provided to the Applicant or, alternately, the PPS will permit the Applicant and his/her counsel to view the disclosed Record in its entirety and the PPS will provide copies of those documents the Applicant and his/her counsel wish to retain. This is to be done within 30 days of the acceptance of this Recommendation; and
2. I recommend the PPS develop a best practices policy that incorporates all of the factors listed in this Review Report that are potential relevant circumstances when exercising its discretion to make a decision under s. 15(1)(f) of the *FOIPOP Act.* In order to allow the PPS time to consider how best to incorporate the list of factors into its best practices, this is to be done within 60 days of the acceptance of this Recommendation.

Respectfully submitted,

Dulcie McCallum, LLB

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