



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

**REVIEW REPORT FI-12-62**

**Report Release Date:** May 16, 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. The responsive Record consists of 100 pages entirely made up of the MEP file. The Record was thoroughly examined by the Review Officer.

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

1. Whether the responsive Record is information that falls under s. 32 of the *Maintenance Enforcement Act* [“*MEA*”]? If the answer is yes, does s. 32 of the *MEA* prevail over of the *Freedom of Information and Protection of Privacy Act* [“*FOIPOP Act*”] pursuant to s. 4A(2)(j)? Did Justice err by failing to make a decision that s. 32 of the *MEA* is paramount to the *FOIPOP Act*? And, did Justice act outside its jurisdiction by processing an Application for Access to a Record for maintenance enforcement records under the *FOIPOP Act*, contrary to s. 4A(2)?
2. If Justice had jurisdiction to make a decision with respect to an Application for Access to a Record under the *FOIPOP Act*, whether Justice correctly applied the mandatory and discretionary exemptions to the severed portion of the Record?

**Findings:** The Review Officer makes the following Findings:

**A. Findings with respect to Jurisdiction and Processing the Application for Access to a Record:**

- a. The Applicant made an Application for Access to a Record to Justice under the *FOIPOP Act* for maintenance enforcement information contained in a Record that was wholly within the custody and control of the MEP;
- b. In responding to the Application for Access to a Record, Justice was obliged to accept but not process the Application for Access to a Record under the *FOIPOP Act* from the Applicant. Justice was restricted to making a decision as to whether or not the information was available under the *FOIPOP Act*;
- c. Justice processed the Application for Access to a Record under the *FOIPOP Act* when it knew or ought to have known that s. 4A(1) of the *FOIPOP Act* dictates that where the information requested falls under one of the statutes listed in s. 4A(2), the enactment listed prevails over the *FOIPOP Act*;
- d. Section 4A(2)(j) refers to s. 32 of the *MEA*. Section 32 prohibits or restricts access by any person to information in the custody and control of the Director of the MEP. The confidential information provided to the Director of the MEP pursuant to s. 32 of the *MEA* is paramount to the *FOIPOP Act* [*Gaetz v. Nova Scotia (A.G.)*, 2005 NSSC 215];
- e. Because of s. 4A(2)(j) of the *FOIPOP Act*, the Director of the MEP has the authority to restrict access to confidential information she receives and can decide what can be disclosed under s. 32 of the *MEA*. The decision to restrict or prohibit access by any person to information received by the Director of the MEP does not fall under the *FOIPOP Act* [Alberta Order F2005-007];
- f. A decision to release information from the MEP records is to be made by the Director of the MEP under the *MEA* and not the *FOIPOP Act*. If this request had been decided by her, there would be no appeal to the Review Officer under the *FOIPOP Act*. Any appeal of the Director of the MEP's decision will be found in the *MEA*;
- g. In this case, Justice only had one option with respect to the appropriate course of action. When the Applicant requested information that was restricted or prohibited under another enactment, which is referred to in s. 4A(2) of the *FOIPOP Act*, to make the decision that the Applicant was not entitled to the Record and give the reason for the refusal. The *MEA* prevails over the *FOIPOP Act*. As part of its decision, Justice should have advised the Applicant, pursuant to its duty to assist pursuant to s. 7 of the *FOIPOP Act*, to redirect his/her Application for Access to a Record to the Director of the MEP under s. 32 of the *MEA*. The Justice decision to refuse access could have or could read as follows:

*The information you are requesting was received by the Director of the MEP under the MEA. Section 32 of the MEA restricts access to this confidential information unless the Director of the MEP decides it can be disclosed. Section s. 4A(1) of the FOIPOP Act clearly states that any enactment that restricts or prohibits access that is listed in s. 4A(2) prevails over the FOIPOP Act. Section 32 of the MEA is the enactment named in s. 4A(2)(j) and thus access to this Record is restricted to disclosure under the MEA only. As such, access to this Record is being denied under the FOIPOP Act because the MEA is paramount to the FOIPOP Act. Please be advised that your request for information should be directed to the Director of the MEP at . . . ;*

- h. Justice issued its decision within 30 days from the date the Application for Access to a Record was received, in compliance with s. 7(2) of the *FOIPOP Act*;
- i. It was not open to Justice to transfer the Application for Access to a Record to the Director of the MEP, even with the consent of the Applicant. A public body can only transfer a request to another public body, not to another department within the same public body [*FOIPOP Act*, s. 10];
- j. With the Applicant's consent, it was open to Justice to redirect the Applicant's request for information to the Director of the MEP as part of its decision, pursuant to its duty to assist [*FOIPOP Act*, s. 7];
- k. Justice solicited the opinion of the Director of the MEP who gave advice to Justice that the disclosure of the information was not prohibited by s. 32 of the *MEA*. If the request for information came directly to her, I assume the Director of the MEP would have made the same decision and disclosed information to the Applicant. I make ***no finding*** whether or not the Director of the MEP's advice was correct or her decision under the *MEA* would have been correct had the Applicant come to or been referred to her: I find I have no jurisdiction over the Director of the MEP to review how she applied the tests under the *MEA* [B.C. Decision F10-12; 2010 BCIPC 52 (CanLII)];
- l. Justice was inconsistent in how it processed the Application for Access to a Record. On the one hand, Justice solicited the advice of the Director of the MEP, recognizing her authority under s. 32 of the *MEA*. However, Justice went on to apply exemptions under the *FOIPOP Act* and to release only part of the Record. Justice has no authority to apply exemptions or release any or all of a Record under the *FOIPOP Act*;
- m. Once Justice made a decision under the *FOIPOP Act*, Justice was correct [and obliged] to advise the Applicant of his/her right to Request a Review from the Review Officer;
- n. The first step in this Review was to satisfy myself that the Record was made up solely of information within the custody and control of the MEP. On careful review of the Record, I am satisfied that it is made up entirely of MEP information and therefore falls under s. 32 of the *MEA*;

- o. In future, upon receiving an Application for Access to a Record, it is incumbent for all FOIPOP Administrators to ask an initial question: “*Is the Application for Access to a Record that I have received one I can make an access decision under the FOIPOP Act or does another enactment prevail over the FOIPOP Act?*” Or, in other words: “*Does the FOIPOP Act authorize me to process an Application for Access for these kinds of records?*” There is a companion question for FOIPOP Administrators to ask: “*Is there any other enactment that contains a, “notwithstanding the Freedom of Information and Protection of Privacy Act” provision that deems it paramount to the FOIPOP Act?*”;
- p. Because of the findings that the *MEA* prevails and Justice should not have processed this Application for Access to a Record under the *FOIPOP Act*, it is neither necessary nor appropriate for me to make Findings with respect to any of the mandatory or discretionary exemptions that were applied by Justice in its decision;

**B. Miscellaneous Procedural Findings:**

- q. There are reasonable grounds to permit the Applicant to file his/her Request for Review late based on evidence provided by the Applicant; and
- r. It was unnecessary for Justice to make a request to provide its Representations in camera. After a careful reading of their letter dated January 21, 2013, Justice had no information in its in camera Representations that would have revealed the Record or disclosed any information that would result in harm, the two principal tests for permitting in camera Representations.

**Recommendations:** The Review Officer makes the following Recommendations:

1. Justice issue a new decision, 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 do not apply under the *MEA*.
2. Justice, in consultation with the Director of the MEP, develop and publish a policy and/or tool with respect to the disclosure of confidential information held by the MEP consistent with s. 32 of the *MEA*.
3. Justice, as the department responsible for the training and day-to-day support of FOIPOP Administrators through the Information, Access and Privacy office, 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 [Refer to Appendix A of this Review Report for the complete text of s. 4A of the *FOIPOP Act*].

4. Justice 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.

**Background to the Review:**

On July 13, 2011, the Applicant filed and Justice received, an Application for Access to a Record under its custody and control pursuant to the *FOIPOP Act*, which reads as follows:

1. *This is an application pursuant to the Freedom of Information and Protection of Privacy Act for access to:*

*Check one*

- (a) *applicant's own personal information; or*  
(b) *other information; or*  
(c) *both applicant's own personal information and other information.*

2. *I am applying for access to the following record: (instructions omitted)*  
*I would like to obtain all information that references my name or case with the NS Maintenance Enforcement Program. Th[is] includes but is not limited to the source of the last known address they used, documentation indicating that they had my telephone number, copies of all documentation sent by the Maintenance Enforcement Program in [another province], including the RESO package, in late November of 1999, copies of all correspondence sent to me, all court orders on file, any documentation that indicates I was living in [another country] as of Feb 2001 (I haven't been back to Canada since then) and any documentation that indicates NS MEP was aware my passport was suspended by [the Director of the MEP in another province], in June of 2001. [The Director of the MEP in another province] sent the Notice of Intention on April 16, 2001. If there is a copy of this document on file with the NS MEP, I would like a copy.*

On July 25, 2011, Justice issued a decision in response to the Applicant's Application for Access to a Record, which reads as follows:

*Access is being granted in part to this request. The records enclosed are a copy of your entire NS MEP file, including the running record and screen shots associated with your file. Some of the information has been removed from this record as allowed under Section 5(2) of the Act. This access to the severed parts of the records has been denied for the following reasons.*

*Section 12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies: (i) the Government of Canada . . .;*

*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.*

*15 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to (c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement;*

*16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.*

*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.*

On July 27, 2012, the Applicant filed, and the Review Officer received, a Request for Review which reads as follows:

*1. This Request for Review arises out of an Application for Access to a Record or Request for Correction of Personal Information submitted to the Nova Scotia Maintenance Enforcement Program on the 28 day of June, 2011, a copy of which Application or Request is attached to this Request for Review.*

*2. The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body;  
Check where applicable*

*X (a) decision dated or made on the 25 day of June, 2011, a copy of which is attached to this Request for Review;*

*3. The applicant requests that the review officer recommend that  
Check where applicable*

*X (a) the head of the public body give access to the record as requested in the Application for Access to a Record;*

*(b) the head of the public body correct the personal information as requested in the Request for Correction of Personal Information;*

*(c) (specify other recommendation or recommendations, if any, you consider appropriate)*

*I am requesting that all severed information be released to me.*

Justice provided the Review Officer with a copy of the severed Record as disclosed to the Applicant and a separate complete copy of the responsive Record with the severances

identified in highlighter. Justice noted the claimed exemptions adjacent to the redactions on the severed Record but without the applicable subsections noted. The Record was examined thoroughly. The responsive Record consists of 100 pages entirely made up of a MEP file.

**Discussion:**

This is an important Review Report for all FOIPOP Administrators, new and experienced. It is very important to understand *that some legislation prevails or is paramount to the FOIPOP Act*. In this Review, the Justice FOIPOP Administrator did not have jurisdiction to process this Application for Access to a Record under the *FOIPOP Act*.

The central issue in this Review is jurisdiction. The Director of the MEP is empowered and responsible to make a determination to disclose information in accordance with s. 32 of the *MEA*, which provides:

***Confidentiality of information***

*32 (1) Information received by the Director pursuant to this Act is confidential and shall not be disclosed except*

*(a) for the purpose of this Act or enforcing a maintenance order filed with the Director;*

*(ab) where the payor is in arrears, the Director may report that to any consumer reporting agency registered pursuant to the Consumer Reporting Act;*

*(b) on request, to a person performing similar functions in another jurisdiction;*

*(ba) in accordance with an information sharing agreement entered into under and for the purpose of the administration of the Employment Support and Income Assistance Act, the Social Assistance Act or any other income assistance program administered by the Department of Community Services;*

*(bb) as authorized by the Minister of Justice; or*

*(c) by an order of the court.*

*(2) Where an order is made pursuant to subsection 31(3) or pursuant to a similar provision in another Act or an Act of the Parliament of Canada, the court may make an order with respect to the confidentiality to be maintained in connection with the information released.*

*(3) Notwithstanding subsection (1), the Director may disclose to a consumer reporting agency registered pursuant to the Consumer Reporting Act*

- (a) the name of a payor who is in default on a maintenance order filed in the office of the Director;*
- (b) the date of the maintenance order;*
- (c) the amount and frequency of the payor's obligation under the maintenance order;*
- (d) the amount of the arrears owing under the maintenance order at the time of the disclosure; and*
- (e) such other information as may be prescribed.*

*(4) Notwithstanding subsection (1), the Director may release information respecting the location, address and place of residence or employment of a payor to a designated authority or a delegate of a designated authority under the Interjurisdictional Support Orders Act for the purpose of that Act. 1994-95, c. 6, s. 32; 1998, c. 30, s. 6; 2004, c. 40, s. 8; 2005, c. 53, s. 1.*

Section 4A of the *FOIPOP Act* reads, as follows:

*4A (1) Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record, the provision of this Act prevails over the provision of the other enactment unless subsection (2) or the other enactment states that the provision of the other enactment prevails over the provision of this Act.*

*(2) The following enactments that restrict or prohibit access by any person to a record prevail over this Act:*

*(j) Section 32 of the Maintenance Enforcement Act;*

The Director of the MEP advised Justice it could disclose the Record. Justice relied on that advice and then proceeded to apply exemptions under the *FOIPOP Act*. Clearly had the Director of the MEP received the access to information request directly from the Applicant or after the request for information is redirected by Justice, the Director of the MEP had the authority to decide if the release of the information would not be contrary to s. 32(1)(a) of the *MEA* and therefore could be disclosed to the Applicant, but this decision would not be made under the *FOIPOP Act*.

The issues in this Review are not new but obviously remained unclear. The *MEA* has been in force since January 1, 1996. Section 4A(2)(j) added s. 32 of the *MEA* to the *FOIPOP Act* and came into effect on November 23, 1999.

There have been decisions dealing with the issue of maintenance enforcement records which have been of assistance in this Review: Nova Scotia's Supreme Court decision, *Gaetz v. Nova Scotia (AG)*, 2005 NSSC 215, NS Review Report FI-04-25, and Canadian



Commissioner decisions, Alta Order F2005-007 and BC Decision F10-12 [2010 BCIPS No. 52 (CanLII)]. For clarification, my predecessor's Review Report FI-99-04 arose out of an Applicant for Access to a Record decision from Justice that predated the amendment which added s. 4A(2)(j) [MEA, s. 32] to the *FOIPOP Act* and on that basis is distinguishable and should no longer be relied upon by Justice.

It is my hope that the legislative inter-relationship between the *FOIPOP Act* and the *MEA* is now clearer. This Application for Access to a Record for the MEP records has resulted in months of work for both Justice and the Review Officer's Office, all of which hopefully will be avoided in the future. If Justice continues to process these access requests under the *FOIPOP Act* this will lead to unnecessary work for the FOIPOP Administrator and the Review Officer, resulting in inefficiency and a burden on resources. Even more importantly, this will lead to unnecessary complication and delay for applicants.

Those at Justice responsible for training and assisting new and experienced FOIPOP Administrators are urged to include in the training and materials provided:

- a. An overview of conflict of laws and paramountcy;
- b. A review of the enactments listed under s. 4A(2) of the *FOIPOP Act*;
- c. In reference to s. 4A(1), a compilation of all statutes that contain a *notwithstanding the Freedom of Information and Protection of Privacy Act* provision;
- d. A complete explanation for the following terms: "paramount", "prevails", "restricts", and "prohibits".

#### **Discussion regarding Miscellaneous Procedural Matters:**

Briefly there are two additional procedural subjects that I will touch on.

The first is in regards to the Applicant's request to file his/her Request for Review late. Pursuant to s. 34(1)(d) of the *FOIPOP Act*, I exercised my discretion to grant the Applicant permission to submit a late Request for Review [beyond the 60 day statutory deadline] based on evidence provided by the Applicant and on which I based the exercise of my discretion.

The second matter is with respect to in camera Representations. On November 30, 2012, Justice made a Request to provide its Representations in camera. Justice attempted to follow the Review Office's, "*In camera Representation Request Procedure*" [online: [www.foipop.ns.ca/pub\\_pol.html](http://www.foipop.ns.ca/pub_pol.html) ], in part. Review Office staff do not have delegated authority to decide if a matter is to be heard in camera. Justice failed to send its request directly to me as required by the procedure.

On December 17, 2012, Justice was advised that its in camera request had been accepted and that its in camera Representations were due on January 7, 2013. On January 3, 2013, Justice requested an extension to January 21, 2013, on which date their Representations were received. Having reviewed the in camera Representations carefully, I find there is

nothing in them that meets the criteria for in camera. The criteria are as follows: the public body's Representations refer explicitly to, or reveal the contents of, the Record, and/or the Representations, if disclosed, would reveal information that may result in harm.

I encourage Justice to take note of the criteria and the distinction made here in the future. I will not keep information in camera that does not meet the tests particularly if to do so would compromise the accuracy of the Review Report. In future, cases where an in camera Representation is received, which does not meet one or both of the two tests above, I will refuse to accept the in camera Representation and request the Representations be redone. Ideally, public bodies will make it clear when they make their request to go in camera, how one or both of the tests can be met [Representations will disclose the Record or disclosure of Representations will result in harm].

**Key Words Considered:** enactment, exclusion, exemption, in camera, jurisdiction, maintenance enforcement, paramount, prevails, prohibits, refer, restriction, restricts.

**Statutes Considered:** *Nova Scotia Freedom of Information and Protection of Privacy Act*, 1993, c. 5, s. 4A(1), s.4A(2)(j), 7, 7(2), 10; *Maintenance Enforcement Act*, 1994-95, c. 6, s. 32.

**Case Authorities Cited:** *Gaetz v. Nova Scotia (A.G.)*, 2005 NSSC 215; NS Review Reports FI-04-25 and FI-09-04 [*Distinguished*]; Alberta Order F2005-007; BC Decision F10-12; 2010 BCIPS No. 52 (CanLII)].

Respectfully submitted,

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

## **Appendix A: Section 4A of the FOIPOP Act**

### ***Conflict with other enactments***

*4A (1) Where there is a conflict between a provision of this Act and a provision of any other enactment and the provision of the other enactment restricts or prohibits access by any person to a record, the provision of this Act prevails over the provision of the other enactment unless subsection (2) or the other enactment states that the provision of the other enactment prevails over the provision of this Act.*

*(2) The following enactments that restrict or prohibit access by any person to a record prevail over this Act:*

*(a) subsection 121(2) of the Canada-Nova Scotia Offshore Resources Accord Implementation (Nova Scotia) Act;*

*(aa) subsection 5(2) of the Child Pornography Reporting Act;*

*(b) Section 19 of the Consumer Reporting Act;*

*(c) Section 51 of the Corporation Capital Tax Act;*

*(d) Section 7 of the Emergency 911 Act;*

*(e) Section 19 of the Forests Act;*

*(f) Section 17 and subsection 104(2) of the Health Protection Act;*

*(g) Section 71 of the Hospitals Act;\**

*(h) subsection (7) of Section 9 of the Juries Act;*

*(i) Section 28 of the Labour Standards Code;*

*(j) Section 32 of the Maintenance Enforcement Act;*

*(k) subsection (2) of Section 87 and Sections 150 and 175 of the Mineral Resources Act;*

*(l) subsection (6) of Section 98 of the Motor Vehicle Act;*

*(m) Sections 53, 61 and 62 of the Occupational Health and Safety Act;*

*(n) subsection (3) of Section 11 of the Pension Benefits Act;*

*(o) Sections 72 and 100 of the Petroleum Resources Regulations made pursuant to the Petroleum Resources Act;*

*(p) subsection (4) of Section 21 of the Primary Forest Products Marketing Act;*

*(q) Section 48 of the Public Trustee Act;*

*(r) Section 9 of the Statistics Act;*

*(s) subsection (3) of Section 9 of the Procedure Regulations made pursuant to the Trade Union Act;*

*(t) subsection (8) of Section 37 and Section 45 of the Vital Statistics Act;*

*(u) Sections 23 and 24 of the Young Persons' Summary Proceedings Act.*

*(3) The Governor in Council may, by regulation, amend subsection (2) by*

*(a) adding to that subsection a reference to an enactment;*

*(b) deleting a reference to an enactment from that subsection.*

*(4) Notwithstanding any other provision in this Act, the provisions in the Vital Statistics Act relating to*

*(a) rights of access to personal information, including the right to request a search of personal information;*

*(b) remedial rights relating to the rights described in clause (a);*

*(c) correction of personal information; and*

*(d) procedures relating to the matters referred to in clauses (a) to (c), including the payment of fees and the searching of and obtaining access to personal information,*

*apply in place of the provisions in this Act respecting the matters in clauses (a) to (d).*

*(5) Notwithstanding any other provision in this Act, the provisions of Section 71 of the Hospitals Act, and any regulations made in respect of Section 71, relating to*

*(a) rights of access to personal information;*

*(b) remedial rights relating to the rights described in clause (a); and*

*(c) procedures relating to the matters referred to in clauses (a) and (b), including the payment of fees and the searching of and obtaining access to personal information,*

*apply in place of the provisions in this Act respecting the matters in clauses (a) to (c).*

[\*Note s. 113 of the *Personal Health Information Act* repeals s. 71 of the *Hospitals Act* and thus any reference to s. 71 in s. 4A of the *FOIPOP Act* below is, as of June 1, 2013, no longer operable.]