REPORT **FI-05-52/53/58**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision by the **HALIFAX REGIONAL SCHOOL BOARD** to disclose a forensic audit into financial activities at a Junior High School.

REVIEW OFFICER: Darce Fardy

REPORT DATE: October 17, 2005

ISSUE: Whether the decision to disclose the forensic report is supported by Sections 20 and 21 of the *FOIPOP* Act.

In three Requests for Review, under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), three third parties have asked me to recommend to the Halifax Regional School Board (the HRSB) that it reverse its decision to disclose an audit report.

Background:

According to a media release by the HRSB on June 22, 2005, it had accepted the resignation of the principal of Gaetz Brook Junior High, who had been on paid leave since February of 2005, while an investigation was underway into financial mismanagement at Gaetz Brook. The investigation concluded that $11,332.96 of school funds were used for non-school purposes during the 2003-04 and 2004-05 school years. As a term of the resignation, the principal agreed to make full restitution of the funds.

The media release concluded that the HRSB will provide the information found in the investigation to both the Department of Education and the police and will cooperate with any additional investigations.

Under Sections 22 and 23 of *FOIPOP*, on receiving the application for a copy of the audit investigation, the HRSB was required to notify interested "third parties" of the application and, subsequently, of the decision, and to advise them they could ask for a review of the decision.

The third parties objecting to disclosure of the audit report, cited two mandatory exemptions under *FOIPOP*: **Section 20**, which protects against an unreasonable invasion of an individual's privacy; and **Section 21**, which prevents a public body from disclosing confidential information under certain circumstances. Here are the relevant parts of the two exemptions.

> **Personal information**
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> **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.
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> **(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 the relevant circumstances, including whether
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> (a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;
>
> (f) the personal information has been supplied in confidence;
>
> **(3)** A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if
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> (b) the personal information was compiled 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;

(d) the personal information relates to employment or educational history;

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(e) the information is about the third party's position, functions or

remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;

Confidential information

21 (1) The head of a public body shall refuse to disclose to an

applicant information

(a) that would reveal

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

The Review Office asked for submissions from all the parties.

The Board, two of the applicants and two of the third parties

responded.

The HRSB's submission:

The HRSB submits that disclosing the audit report is not an unreasonable invasion of personal privacy because key findings of the report have already been made public and "certain third parties" publicly advocated for its release.

Following the procedure laid down by Nova Scotia Courts to use in interpreting Section 20, [*Cyril House and 144900 Canada Inc.* (1999) unreported; *Dickie v. Nova Scotia (Department of Health*) C.A. No. 148941 (1999)] the HRSB considered s.20(4) and concluded that part (e) applied because the audit contains information about the third party's position and functions as an employee of a public body. The HRSB noted that, according to the Court's directives, if any part of s.20(4) applies then disclosing the audit does not constitute an unreasonable invasion of a third party's privacy and no other subsections need to be considered.

The HRSB acknowledges that s.20(4)(e) may not apply to the entire audit report and believes that Section 20(3)(b) and (d) may apply because the audit "is a result of an investigation of (one of the third parties) and contains information about (that third party's) employment history."

However, continuing to follow the guide laid down in *Dickie* and *Cyril House,* the HRSB moved on to consider the relevant circumstances found in s.20(2) and decided that the need to disclose the audit "is desirable for the purpose of subjecting the activities of the HRSB to public scrutiny." HRSB concluded that this need for transparency outweighs the interests of the third party in this case.

The submission of Applicant #1:

The Applicant, through a solicitor, noted that he could not determine why disclosure would be an unreasonable invasion of anyone's personal privacy because he does not know the identity of the third party and does not know the basis upon which the third party takes that position.

However, he says that the information should be disclosed because disclosure is clearly in the public interest. His reasons include:

- the principal, the subject of the audit, was in a position of trust;
- the misspent money was raised through school fees and fund raising activities;
- the principal was allowed to resign his position;
- no details of the audit have been made public; and
- the use and safeguarding of public money and the actions of school officials, both elected and on staff, must be open to public scrutiny.

The Applicant believes s.20(3)(b) does not apply because the audit "was not compiled as part of an investigation into a possible violation of the law" but was, instead, an investigation into school accounts. The Applicant said that "[a]ny violation of the law would appear to be an afterthought, as is indicated by the fact that the school board is leaving it to the police to take any steps if they feel they are necessary."

The applicant believes the audit falls under s.20(4)(e) or (f) because the information in the audit is about the third party's position as an employee of a public body and it reveals details of a contract of a supply of goods or services to a public body.

The submission of Applicant #2:

This Applicant also applied the principle of public interest to the matter and argued that s.20(4)(e) applied.

The third parties' submission:

Although there are three third parties, this submission represents the views of two of them. One of the third parties did not make a submission.

The submission noted that the HRSB, as part of the settlement, "had agreed to keep details of the situation confidential." It said HRSB also agreed that any public comment about the resignation would be limited to a mutually agreed media release.

The third party said that the Review Office and the Nova Scotia Courts had noted "many times" that the purpose of the Act is to strike a balance between access to information about public bodies, and the possible harm that may come from the disclosure of the information.

With respect to s.20(3), the third party believes that part (b) and (d) apply.

The submission argues that 20(3)(b) applies because there were allegations against the school principal that he violated his duties under the *Education Act* and more generally that there was misappropriation of funds.

The third party draws on *Dickie* to support its assertion that 20(3)(d) applies because the audit report contains the "employment history" of the principal. *Dickie* called for a broad definition of the term:

> The term "employment history" is not defined in the Act, but both the words themselves and the context in which they are used suggest the ordinary meaning of the words in the employment context is intended . . .
>
> Section 20(3)(d) emphasizes the generality of the expression by speaking not simply of personal information which is employment history, but of personal information which "relates to" employment history. (Paras 45, 46)

Dickie also cited a decision of the British Columbia Information and Privacy Commissioner in Order No. 41-1995:

> I agree . . . that employment history includes information about an individual's work record. I emphasize the word "record" because in my view this incorporates significant information about an employee's performance and duties.

The third party also notes that *Dickie* found "employment history" to include "statements about (the employee's) conduct elicited in an interview by his employer as part of an investigation into his work-related conduct." (Para.44)

As required, the third party went on to consider the circumstances found in s.20(2) and decided that disclosing the audit report "will not significantly improve public scrutiny of the activities of HRSB (because) the parties have agreed to the text of a media release which contains sufficient information to ensure public scrutiny."

The third party also argues that s.20(2)(f) is engaged because "the parties came to a specific arrangement to respect the confidentiality of these allegations, and to limit disclosure related to them."

With respect to s.21(1) the third party recognizes that all three subsections of s.21(1) must apply for the exemption to stand.

It argues that s.21(1)(a) applies because the audit report contains labour relations information of a third party. It went on to explain that "[a]s in any unionized workplace, allegations of misconduct against one employee are not simply an issue between an employee and employer. The union is engaged because the employee's rights are the collective rights protected by the collective agreement." Section 21(1)(b) applies because there was an explicit understanding of confidentiality. Finally, s.21(1)(c) applies because "disclosure could reasonably be expected to

> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied;
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

Conclusions:

Section 21:

I've concluded that having regard to the circumstances of this audit that subsection (b) does not apply for the following reasons:

- The audit was the result of an investigation into misspent funds. There could be no reason for the third parties to conclude or expect that such an audit would be held in confidence.

- The audit report was given to the Department of Education**,** another public body under *FOIPOP,* and there is no evidence that the Department of Education accepted the audit report with such a condition of confidentiality attached.
- So much of the information which prompted the audit is already in the public domain; and
- I've seen no evidence to support the third parties' assertion that the audit report would be held in confidence.

Although I am resting my decision on s.21 on part (b), the reader cannot conclude that I accept the third party's arguments with respect to whether the audit report contains "labour relations information of a third party." If part (b) is not sustained, s.21 cannot stand. I need not consider the arguments related to subsections (a) and (c).

Section 20

I am not satisfied that the arguments of HRSB with respect to ss.20(4)(e)are convincing.

I concede that the third party's arguments on s.20(3) are arguable but they are presumptions and cannot be considered in isolation of the relevant circumstances found in s.20(2).

No public body can make decisions on access requests without first considering the stated purpose of the Act, found in **Section 2**, and the words of Justice Saunders in *O'Connor v. Nova*

Scotia (2001) NSCA 132 in paras 36-41. Noting that *FOIPOP* expects public bodies to be **fully** accountable to the public, he wrote:

> ... it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right to access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair and that divergent views will be heard.

So, given the wording of the Act and the words of Justice Saunders, and given the importance attached to the need for public confidence in the financial management of our school system, I have concluded that the audit report should be made public, with some minor severing.

Recommendations:

- that the HRSB reaffirm its decision in writing to the Applicant, the third parties and the Review Officer, to disclose the audit report. (*The Review Officer will contact the HRSB to identify the recommended severing*.)

Section 40 of the Act requires the HRSB to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, the HRSB is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 17th of October 2005.

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Darce Fardy, Review Officer