



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

**OWN-MOTION PRIVACY REVIEW REPORT P-12-05:
*What's Driving Privacy in Nova Scotia?***

Report Release Date: July 17, 2013

Public Body: Service Nova Scotia and Municipal Relations [SNSMR]

- Issues:**
1. Whether SNSMR erred by disclosing the names and addresses of all registered drivers in Nova Scotia to the War Amps, a private charity, contrary to s. 27 of the *FOIPOP Act* after Bill 125 amended the *Motor Vehicle Act*?
 2. Whether SNSMR erred by disclosing the names and addresses of all registered drivers in Nova Scotia to the War Amps, a private charity, contrary to s. 27 of the *FOIPOP Act* prior to the amendments to the *Motor Vehicle Act*? If yes, was the disclosure otherwise allowed by operation of s. 5(3) of the *FOIPOP Act*?
 3. Whether SNSMR has failed and continues to fail to protect the privacy interests of Nova Scotia's registered drivers by failing to notify the public of the amendment to the *Motor Vehicle Act* to give them the informed opportunity to opt out?
 4. Whether SNSMR has not and is not following privacy best practices by failing to prepare and publish a Privacy Impact Assessment [PIA]?

Summary: Since 1988, SNSMR has shared the personal information of all registered drivers in Nova Scotia with the War Amputations Key Tag Program ["War Amps"]. This disclosure breached s. 27 of the *FOIPOP Act* and was not saved by s. 5(3) of the *FOIPOP Act*. The Review Officer found that the recent amendment to the *Motor Vehicle Act* [Bill 125] now renders this privacy practice legally authorized under s. 27(a) of the *FOIPOP Act*. Prior to this, SNSMR was in breach of s. 27 of the *Act* because there was no enactment authorizing the sharing of personal information. Section 5(3) of the *FOIPOP Act* was never intended to preserve disclosure practices that violated

personal privacy. The practice was also in contravention of Nova Scotia's predecessor legislation, the *Freedom of Information Act*, since the program's inception in 1988. The Review Officer also found that SNSMR ought to have appropriately informed the public of their statutory right to opt out of the program as provided for in the amendment to the *Motor Vehicle Act*.

Recommendations:

Pursuant to ss. 5(1)(b), (c), and (e) of the *PRO Act*, the Review Officer made the following Recommendations to SNSMR:

1. Provide notice to all registered drivers in Nova Scotia that an amendment to the *Motor Vehicle Act* gives SNSMR legal authority to share drivers' personal information with the War Amps including by updating its Website to reflect the changes. Include in the notice the fact that the name and address of all registered drivers *have been and will continue to be shared* with the War Amps unless a driver chooses otherwise – *opt out*. Provide all existing registered drivers with user-friendly means to *opt out* of the War Amps Key Tag program: written notice, on-line or by telephone. Provide a copy of the notice to the Review Officer;
2. Amend the registration and re-registration documentation to apply for a driver's license to put all registrants on notice of s. 71A of the *Motor Vehicles Act* and their right to opt-out of disclosure to the War Amps. Preferred privacy practice would have the default being to opt out and require specific consent to opt in. Recognizing the public interest served by the War Amps program, however, I recommend the amendment to the registration and re-registration documentation should be formatted as a check box to *opt out* [default being to opt in]. Provide a copy of the modified registration forms to the Review Officer;
3. Prepare and make public the PIA on the disclosure of drivers' personal information to the War Amps to be completed well in advance of the next scheduled transfer of personal information [April 1, 2014]. Provide a copy of the PIA to the Review Officer; and
4. Complete the notification to existing registered drivers, modifications to the drivers registering or registering and the PIA within 6 months of these Recommendations. This will enable registered drivers and new drivers to receive notice of the changes and to make a decision whether or not to opt out.

Compliance with Recommendations 1-3 inclusive with respect to providing copies to the Review Officer should include evidence the 6 month timeline to notify registered drivers has been met.

Keywords: address, consent, default, grandfather clause, name, notice, opt in, opt out, personal information, privacy, PIA, Privacy Impact Assessment, registered drivers, War Amps.

Statutes considered: *Freedom of Information and Protection of Privacy Act*, s. 2(a)(4), 3(1), 5(3), 27; *Freedom of Information Act*, SNS 1977 c. 10, s. 2(g), 4(a), 6(2)(a); *Privacy Review Officer Act*, SNS 2008, c 42, s. 5(1)(b), 5(2), *Motor Vehicle Act*, RSNS 1989, c 293, s. 91A, *Bill 125*, *War Amps Key Tag Act*, 4th Sess., 61st G.A., Nova Scotia, 2012 (assented to 6 December 2012, SNS. 2012, c. 52).

Cases Cited: *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), 2011 SCC 7, [2011] 1 S.C.R. 160; *Nova Scotia Review Reports FI-11-43*, FI-08-107.

Others Cited: Service Nova Scotia Access to Business (A2B) Quick Reference User Guide; Service Nova Scotia Online Express Services Privacy Policy; Government of Nova Scotia; Privacy Policy: Chapter 4: Information and Records Management, Chapter 4.11 - Privacy Policy; Nova Scotia, Legislative Assembly, Hansard, 61st Leg, 4th Sess, No 125 (13 November 2012) at 3640, 3641, and 3645 (John MacDonell); Nova Scotia, Legislative Assembly, Hansard, 61st Leg, 4th Sess, No 125 (13 November 2012) at 3644 (Keith Colwell).

OWN-MOTION PRIVACY REVIEW REPORT P-12-05:
What's Driving Privacy in Nova Scotia?

Executive Summary

In December 2012, Service Nova Scotia and Municipal Relations [“SNSMR”] introduced and passed Bill No.125, *War Amps Key Tag Act*, amending the *Motor Vehicle Act* by adding s. 71A. With this amendment, SNSMR became authorized to disclose registered drivers’ personal information to the War Amputations Key Tag program [“War Amps”] in a legally permissible manner thus complying with the *Freedom of Information and Access to Privacy Act* [“*FOIPOP Act*”]. Regrettably, this was not always the case.

For several years, the Freedom of Information and Protection of Privacy Review Office has fielded calls from concerned citizens wanting to know why their personal information was disclosed to a private charity without their consent. Prior to the enactment of the *Privacy Review Officer Act* [*PRO Act*], there was no provision for independent privacy oversight by the Review Officer and, therefore, I had no legal authority to investigate these complaints. After the *PRO Act* coming into force on November 25, 2008, we continued to receive calls from the public with the same concerns. As is required by s. 5(2) of the *PRO Act*, callers were referred back to SNSMR to exhaust its internal privacy complaint process. None of these callers returned to file a formal complaint with the Review Officer.

Last year, I was informed by the Auditor General’s May 2013 Report. That Report clearly indicated that SNSMR was continuing to rely on a literal interpretation of s. 5(3) of the *FOIPOP Act*, essentially a ‘grandfather clause’, which if applicable, protected the longstanding practice of disclosing personal information of all registered drivers to the War Amps. On that basis, I corresponded with SNSMR on April 11, 2012 to raise my concerns and give notice of a possible Own-Motion investigation. I initiated my Own-Motion investigation on June 22, 2012. In July and August of 2012, SNSMR provided information with respect to its practice of disclosure to War Amps and advised there were ongoing discussions with senior officials within the Department. On August 22, 2012, SNSMR advised of the status of the discussions and indicated it would keep me informed as they moved forward.

Unfortunately this did not happen. Bill 125 was proclaimed in December 2012 and the Review Officer was neither notified nor consulted with respect to that proposed legislation. In early June 2013, I requested an update and made a decision to issue a Review Report of my Own-Motion investigation. Nearly one year after initiating the investigation and six months after Bill 125 was passed, on June 18, 2013, SNSMR provided an update on its progress and provided a copy of Bill 125. The delay in keeping the Review Officer informed in a timely manner is obvious and disappointing.

I am left with a question: If SNSMR believed they were allowed to continue releasing the personal information of registered drivers based on a practice preserved by s. 5(3) of the *FOIPOP Act* as it claimed, why the need to do an amendment to the *Motor Vehicle*

Act specifically authorizing the practice? This leads me to conclude how important issuing this Review Report is to explain the matter fully to the public pursuant to ss. 5(1)(b), (c), and (e) of the *PRO Act*.

I am pleased that SNSMR made the decision to move forward with Bill 125. It is my hope that other public bodies sharing personal information in a similar situation can be informed by the Report. Many public bodies appear to be prone to adopt a literal interpretation of s. 5(3) of the *FOIPOP Act*. I believe that such an approach is contrary to that section of the legislation and to the overall purpose of the privacy protections in the statute. While I appreciate that some aspects of the issue may be moot due to recent legislative amendments contained in Bill No. 125, I feel that the issue of the appropriate interpretation of s. 5(3) of the *FOIPOP Act* remains and a privacy concern continues for registered drivers.

The outstanding privacy issue is the lack of transparency evidenced by SNSMR in its implementation of Bill 125 since December 2012. This amendment to the *Motor Vehicle Act* was introduced with a promise that registered drivers would be informed that they now have the right to withhold their personal information from the War Amps. On the evidence before me, I conclude that the Minister clearly had that intention but that the necessary steps have not been taken to fulfill that promise.

What follows is the complete public Own-Motion Privacy Review Report. The Report attempts to further clarify s. 5(3) of the *FOIPOP Act*. It calls upon SNSMR to clearly inform drivers that their personal information will be disclosed under the *Motor Vehicle Act* to the War Amps, and how Nova Scotians can exercise their right to elect not to have their personal information shared should that be their choice.

In the course of an access Review Report [*FI-11-43*] in Recommendation #4, I extended an invitation to the SNSMR to consult on these privacy matters. Unfortunately, SNSMR declined that offer. The Department's response was as follows:

Thank you for your offer of a privacy consultation. However, we will continue to use our internal resources to ensure compliance with FOIPOP legislation.

Had that offer been taken up, the necessity for a public report may have been averted and the time expended on the investigation avoided. I remain committed to encouraging and supporting public bodies in their efforts to comply with privacy and access legislation. I trust that SNSMR will accept this Review Report's Recommendations in this spirit. As I stated, Bill 125 amending the *Motor Vehicle Act* was an important step in addressing my initial privacy concerns. It is my hope that by acting upon my Recommendations, SNSMR will continue to take the necessary steps to respect the privacy of Nova Scotia's registered drivers.

The War Amps is in an enviable position. The names and addresses it receives from SNSMR is the kind of personal information hosts of charities and business covet. That points to the final reason why this Report is important for the public to have.

Background

The War Amps is a, “Canadian nation-wide registered charitable organization operated under the direction of war amputees.” It provides services and support to all amputees. It also works to preserve “Canada’s military heritage.” The War Amps relies exclusively on donations from the public solicited through the Key Tag and Address Label Service to fulfill its charitable work.

The War Amps uses a mailing list that is made up of the name and address of every person in Nova Scotia who is a registered driver. This database is supplied to the War Amps by the Registry of Motor Vehicles of SNSMR. Using this database, the War Amps creates complimentary key tags which, if attached to lost keys, attempt to ensure their return to the owners address by courier. This service is free of charge regardless of whether the recipient chooses to make a donation to the War Amps or not.

Key tags are mailed out en masse, to all Nova Scotia's drivers every year on the first day of April. Soon afterwards, and for several years now, my Office has fielded calls from people wanting to know how their personal information has ended up in the hands of the War Amps. As is our practice and as required by s. 5(3) of the *PRO Act*, callers were advised of their right to file a privacy complaint and redirected to SNSMR. Each April, despite several redirected complaints to the Review Office, these inquiries resumed. Last year, I made a decision to investigate the arrangement between SNSMR and the War Amps because it involves the disclosure of the personal information of so many Nova Scotians.

In the course of that investigation, it was confirmed that in May 2011 Nova Scotia’s Auditor General published a Report into the information handling processes at SNSMR. The Report addressed the ongoing disclosure of driver information to the War Amps and recommended the formalization of the informal agreement into a Service Level Agreement. He did not recommend that the practice cease because, in his estimation, disclosure was permitted under s. 5(3) of the *FOIPOP Act*. With great respect, as the Freedom of Information and Protection of Privacy Review Officer, I have the expertise under the *FOIPOP Act* and, in my opinion; the interpretation given by the Auditor General did not have the benefit of that experience with access and privacy including knowledge and application of the predecessor statute to the *FOIPOP Act*.

On July 21, 2012, I contacted the Freedom of Information and Privacy Administrator at SNSMR to convey my concerns about their disclosure practices. I explained that my interpretation of s. 5(3) of the *FOIPOP Act* differs from that of the Auditor General. I raised the possibility of an Own-Motion Investigation if my concerns were not satisfactorily dealt with, and requested the following information:

1. An update on the status of implementation of the Auditor General’s Recommendations regarding privacy contained in c. 8 of his Report: *Service NS and MR: Registry of Motor Vehicles Information and Technology*;
2. A copy of the present privacy policy and the new privacy statement to customers;

3. Confirmation that SNSMR is seeking the consent of drivers for the disclosure of their personal information to War Amps, and details of the standing agreement, if any.

By email dated July 6, 2012, my first two questions were answered in full. In answer to question 3, I was told that the Deputy Director was exploring the issue and I would be kept advised. On August 23, 2012, SNSMR corresponded as follows:

We are in the process of taking steps to clarify the Department's ability to disclose information to War Amps. We are also looking at a Service Level Agreement with War Amps if we remain with the status quo.

I will continue to keep you informed as we make progress.

On June 3, 2013, having heard nothing further and receiving more inquiries from the public, I made a decision to complete my Own-Motion Privacy investigation. On June 12, 2013, SNSMR responded that it has been disclosing personal information in this manner for many years, by informal agreement, reportedly since 1988. The practice was predicated on an exchange of letters. By amendment to the *Motor Vehicle Act* passed on December 6, 2012, SNSMR now has statutory authority to share the personal information of every registered driver in Nova Scotia, with the War Amps, without their consent. It was disappointing to discover that even though the offer to consult had been made very recently on these issues and a commitment made by the Department to keep us informed on the progress vis a vis the War Amps, there was no notice to the Review Office about the new legislation nor any attempt to ask us to review the Bill to see if it addressed our concerns. This either demonstrates poor communication or lack of regard for the expertise of my Office, both of which are equally disturbing and unfortunate.

From the outset, SNSMR has relied on a literal interpretation of s. 5(3) of the *FOIPOP Act*, in effect, 'grandfathering' their War Amps disclosure practices. I believe that this approach runs afoul of the *FOIPOP Act*. It is inconsistent with the accepted approach to statutory interpretation and, while I appreciate that the issue may be moot due to recent legislative amendments, this interpretation of s. 5(3) of the *FOIPOP Act* remains unaddressed.

Issues

1. Whether SNSMR erred by disclosing the names and addresses of all registered drivers in Nova Scotia to the War Amps, a private charity, contrary to s. 27 of the *FOIPOP Act* after Bill 125 amended the *Motor Vehicle Act*?
2. Prior to the amendments to the *Motor Vehicle Act*, whether SNSMR erred by disclosing the names and addresses of all registered drivers in Nova Scotia to the War Amps, a private charity, contrary to s. 27 of the *FOIPOP Act*? If yes, was the disclosure otherwise allowed by operation of s. 5(3) of the *FOIPOP Act*?
3. Whether SNSMR has failed and continues to fail to protect the privacy interests of Nova Scotia's registered drivers by failing to notify the public of the

- amendment to the *Motor Vehicle Act* to give them the informed opportunity to opt out?
4. Whether SNSMR has not and is not following privacy best practices by failing to prepare and publish a Privacy Impact Assessment [PIA]?

Discussion

Section 3(1) of the *FOIPOP Act* defines “personal information” and reads, in part, as follows:

(i) "personal information" means recorded information about an identifiable individual, including

(i) the individual's name, address or telephone number,

The *FOIPOP Act* sets out when a public body is authorized under the *FOIPOP Act* to disclose personal information. Section 27 reads as follows:

Disclosure of personal information

27 A public body may disclose personal information only

(a) in accordance with this Act or as provided pursuant to any other enactment;

(b) if the individual the information is about has identified the information and consented in writing to its disclosure;

(c) for the purpose for which it was obtained or compiled, or a use compatible with that purpose; ...

[Emphasis added]

The *Privacy Review Officer Act* [*PRO Act*] was proclaimed on November 25, 2008. This legislation filled the gap in the *FOIPOP Act*, which had made no provision for independent oversight over decisions made by public bodies with respect to privacy complaints. In addition to enabling citizens to file complaints with the Review Officer, under the *PRO Act*, I am empowered to commence an investigation on my Own-Motion. The relevant provision of the *PRO Act* states:

5(1) In addition to the Privacy Review Officer's duties and powers referred to in Section 6 with respect to reviews, the Privacy Review Officer may ...

*(b) **initiate an investigation of privacy compliance** if there are reasonable grounds to believe that a person **has contravened or is about to contravene** the privacy provisions and the subject-matter of the review relates to the contravention;*

Issue #1: Whether SNSMR erred by disclosing the names and addresses of all registered drivers in Nova Scotia to the War Amps, a private charity, contrary to s. 27 of the *FOIPOP Act* after Bill 125 amended the *Motor Vehicle Act*?

On December 6, 2012, Bill 125 amending the *Motor Vehicle Act* became law. The Bill amended the *Motor Vehicle Act* to permit the disclosure of the names and addresses of every registered driver in Nova Scotia to the War Amps for the purpose of the Key Tags Program.

The authority for disclosure is provided in s. 71A of the *Motor Vehicle Act*, which reads as follows:

71A (1) The Department may disclose the name and address of every person who is issued a driver's license to The War Amputations of Canada for the purpose of allowing The War Amputations of Canada to conduct its Key Tag Service program.

(2) The disclosure of information pursuant to subsection (1) is subject to such terms and conditions as the Minister considers appropriate.

(3) Where a person requests of the Department that the person's name and address not be disclosed pursuant to subsection (1), the Department shall cease to disclose the person's name and address to The War Amputations of Canada.

[Emphasis added]

Now SNSMR relies on Bill 125 for authority to share personal information of registered drivers with the War Amps.

Finding:

On the basis of this amendment to the Motor Vehicle Act, I find that disclosure of driver's names and addresses to the War Amps occurring after December 6, 2012 complies with the FOIPOP Act by virtue of s. 27(a) of the FOIPOP Act "as provided pursuant to any other enactment".

Issue #2: Whether SNSMR erred by disclosing the names and addresses of all registered drivers in Nova Scotia to the War Amps, a private charity, contrary to s. 27 of the FOIPOP Act prior to the amendments to the *Motor Vehicle Act* If yes, was the disclosure otherwise allowed by operation of s. 5(3) of the FOIPOP Act?

SNSMR maintains that it has been sharing drivers' personal information with the War Amps since 1988 by 'informal agreement', in effect, an exchange of letters. The Department relies on s. 5(3) of the FOIPOP Act, which it argues 'grandfathers' all past customs and practices. On this interpretation, it maintains that it is saved by s. 5(3) of the FOIPOP Act and, therefore, was legally authorized to continue to disclose names and addresses to the War Amps. I respectfully disagree.

SNSMR admits that they have been disclosing the personal information to the War Amps, without consent, since approximately 1988. In other words, this practice has been in place for 24 years. They do not dispute that this practice would violate s. 27 of the FOIPOP Act, but submit that it is saved by s. 5(3) of the FOIPOP Act, which reads, as follows:

*Nothing in this Act restricts **access to information provided by custom or practice** prior to this Act coming into force. 1993, c. 5, s. 5; 1999 (2nd Sess.), c. 11, s. 5 .*
[Emphasis added]

The *FOIPOP Act* came into force on July 1, 1994. Based on SNSMR's Representations, it appears that the Department considered their reliance on s. 5(3) a complete defense. However, they have failed to take into account that prior to the *FOIPOP Act* coming into force, there was predecessor access and privacy legislation.

Nova Scotia was the first province in Canada to enact access to information legislation. The *Freedom of Information Act*, S.N.S., 1977, c. 10 [*"FOI Act"*] came into force on May 19, 1977. The *FOI Act* remained in force until repealed [by s. 51] and replaced with the present day *FOIPOP Act*.

In order for the custom or practice to have been legal, it would have had to have complied with the precursor legislation, the *FOI Act*. This means that, SNSMR must also be able to show:

1. The custom or practice complied with the *FOI Act*; or, if it did not,
2. The custom or practice was in place prior to May 19, 1977 and was saved by a similar grandfather clause contained in the *FOI Act* at s. 5.

SNSMR indicates that the practice of disclosing personal information to the War Amps began in approximately 1988. That practice began under the original access to information legislation, the *FOI Act*, and was required to comply with that legislation.

The *FOI Act* defined "personal information" in the following terms:

*2(g) "personal information" means information respecting a **person's identity, residence, dependents, marital status, employment, borrowing and repayment history, income, assets and liabilities, credit worthiness, education, character, reputation, health physical or personal characteristics or mode of living;***
[Emphasis added]

The name and address of a registered driver fell within the definition of "personal information" under the *FOI Act*. The following are the relevant provisions of the *FOI Act*. These sections imposed a statutory duty on SNSMR prohibiting access to personal information without consent. The relevant sections read as follows:

Safeguarding of personal files

6(2) A department maintaining personal information files shall
(a) not make the personal information contained therein available to another department or person for another purpose without the person's consent;

Information for which permission is not granted

4 Notwithstanding Section 3, a person shall not be permitted access to information which

(a) might reveal personal information concerning another person;

The practice of disclosing driver information, en masse, to the War Amps was contrary to the *FOI Act* when the practice began in 1988. The practice of disclosure was not in place prior the *FOI Act* and therefore no custom had been established. The 1977 *FOI Act*, which did contain a ‘grandfather clause’ similar in wording to s. 5(3) of the *FOIPOP Act*, therefore, had no application. At the time the new *FOIPOP Act* came into force in 1998, the practice was already in contravention of the *FOI Act*, and therefore, SNSMR was not able to rely on s. 5(3) of the *FOIPOP Act*, even if it applied.

Finding:

I find that the practice to disclose registered drivers’ personal information to War Amps that began in 1988 under the FOI Act was contrary to law from the outset. The breach continued when the new FOIPOP Act came into force in 1998. I also find that even if s. 5(3), or its predecessor s. 5 under the FOI Act, applied in this kind of situation, which I find it does not, as the practice was not in place prior to 1977, the practice was in contravention of the law under the FOI Act when it began in 1988.

Moreover, any provision such as s. 5(3) of the *FOIPOP Act* must be read in light of the overall purpose of the statute. In my view, SNSMR has misinterpreted this section and relied on it to do indirectly what it is not authorized to do directly. Justice Fish in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7 (CanLII), 2011 SCC 7, [2011] 1 S.C.R. 160, at para. 46, stated that the interpretation of a statute must accord, “. . . with the plain words of the provision, its legislative history, its evident purpose, and its statutory context.” This is to say, SNSMR’s interpretation of s. 5(3) of the *FOIPOP Act* is inconsistent with the modern approach to statutory interpretation:

Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. (Driedger, Construction of Statutes (2nd ed. 1983), at p. 87)

Section 5(3) of the *FOIPOP Act* cannot be relied upon by a public body in a careless or indifferent manner to truncate personal privacy rights simply because it has always done so or because it is expedient to do so.

In Review Report FI-08-107, I wrote:

[Section 5(3) of the Act] preserves how people accessed information prior to the access legislation being enacted and confirms that nothing in the Act restricts those customs or practices. I read s. 5(3) to mean that none of the exemptions in the Act can be relied on to withhold information that was previously available by custom or practice.
[Emphasis added]

The subject of that Review was access to personal information collected by Community Services of a former foster child while s/he was in care. Prior to the proclamation of access to information legislation there was an established practice of disclosing personal information to former foster children. This custom was premised on what was considered to be in the best interests of that child. I found that s. 5(3) of the *FOIPOP Act* preserved a former foster child's right to access their personal information as that practice predated access legislation and remained compatible with the purpose for which it was originally collected. Specifically, the customary practice of allowing adult children to access to their own personal history while in foster care was congruent with the values of Community Services and in the interests of their former clients. In the case of Community Services, I felt that generous disclosure practices to former foster children was consistent with the purposes of the *FOIPOP Act*, and I recommended that they honour this past practice. This is not the case in this Review.

The key to s. 5(3) of the *FOIPOP Act* becomes clear when comparing that Review finding with the Review at hand. Section 5(3) is about enabling a public body to carry on with a practice to provide *citizens* access to the same kinds of information to which they were entitled prior to the enactment of the *FOIPOP Act*. It does not give a **public body** license to share personal information it collects with other outside agencies such as a charity. The public body's responsibility to safeguard personal information is clearly delineated by s. 27 of the *FOIPOP Act*.

Finding:

I find s. 5(3) of the FOIPOP Act is intended to preserve a person's right to access information that they enjoyed historically prior to access to information legislation being enacted. I also find that the section [and its predecessor s. 5 under the FOI Act] was never intended to allow public bodies to disclose personal information with outside agencies, without consent, thereby breaching individuals' privacy.

Let me be clear. I do not object to the disclosure of driver's personal information to the War Amps. They provide an invaluable service to those they serve. However, SNSMR is legally bound to abide by provisions of the *FOIPOP Act*. Entrusted with the personal information of hundreds of thousands of Nova Scotia registered drivers, SNSMR must not disclose that personal information unless authorized by law to do so. Nova Scotians need to have the right to control their personal information and have the choice of whether or not it is shared with a charity. SNSMR collects driver information for the purpose of regulating drivers. It does not have a mandate to return lost keys or to promote fundraising of a charity.

Finding:

While the goals of War Amps are laudable, I find that SNSMR erred in disclosing personal information collected for driver regulation in order to enable a charity to achieve those goals when they are not “compatible purposes” as required by s. 27(c) of the FOIPOP Act.

It would be contrary to the purposes of the legislation to rely on s. 5(3) of the *FOIPOP Act* to continue a practice that runs afoul of s. 2(a) of the *FOIPOP Act*. In particular s. 2(a)(iv) of the *FOIPOP Act* states an important purpose of the statute:

*to ensure that public bodies are fully accountable to the public by
(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies;
[Emphasis added]*

Finding:

I find that prior to December 6, 2012, SNSMR ran afoul of the FOIPOP Act privacy protections because it did not have legal authority to disclose drivers’ personal information to the War Amps.

Issue #3: Whether SNSMR has failed and continues to fail to protect the privacy interests of Nova Scotia’s registered drivers by failing to notify the public of the amendment to the *Motor Vehicle Act* to give them the informed opportunity to opt out?

On November 8, 2012, Bill 125 was introduced by Government and passed the Legislative Assembly on December 6, 2012 with the clear promise that it would provide information to Nova Scotia’s registered drivers about how their personal information will be disclosed to the War Amps and how they could opt out of these disclosures if they chose to do so. With great respect, this has not happened.

On November 13, 2012, the Minister for SNSMR aptly described the amendment on Second Reading, in the following terms:

Today's amendment will help clarify for Nova Scotians how their information is provided to The War Amps, as well as how drivers can request that their information not be shared. This is an example of how this government is working to ensure that Nova Scotians are better informed and have the information they need to make choices about their privacy. [Nova Scotia, Legislative Assembly, Hansard, 61st Leg, 4th Sess, No 125 (13 November 2012) at 3640 (John MacDonell)]

(. . .) In summary, this government's priority is to balance the privacy rights of Nova Scotia drivers with the rights of those citizens who do wish to receive information from The War Amps on the key return program. This change will benefit Nova Scotia drivers by clarifying for them what

information is sent to the War Amps and how they can request their information not be shared.

*Let me be clear, Mr. Speaker. Nova Scotians are generous and caring people, but they want to know their privacy is protected and respected, even when it comes to charitable giving. **So we're doing the right thing by clarifying the bill for Nova Scotia drivers and making sure they know what information is provided to the War Amps and how they can request that their information not be shared.*** [Ibid, at 3641]

*The information is really being disclosed by the Department of Service Nova Scotia and Municipal Relations to the War Amps. We're giving them the information for people who have a licence [sic] in Nova Scotia. **What this bill really does is ensure that if people don't want that information to go forward they can make that request and we'll see that that does not happen.*** [Ibid, at 3645]
[Emphasis added]

It is clear that the Minister intended to place priority on privacy and choice for Nova Scotians. If the calls to my Office are any indication, however, many Nova Scotians still do not know, ***“what information is provided to the War Amps and how they can request that their information not be shared”***. Without further action being taken, Bill 125 was only the first step, albeit an important one: to provide SNSMR with the necessary legal authority to disclose registered driver’s names and addresses to a private charity.

The Minister wanted to assure Nova Scotians that the Bill 125 was part of this government’s efforts to, ***“ensure that Nova Scotians are better informed and have the information they need to make choices about their privacy”***. Nova Scotia’s drivers now have the right to choose to opt out of the War Amps Key Tag program and have the right to be informed of that right.

Finding:

I find SNSMR has failed to communicate the change to Nova Scotia’s registered drivers in a reasonable manner. As a result, I find there are outstanding concerns about SNSMR’s failure to adequately communicate these changes to registered drivers and to all future registered drivers in the province, which SNSMR needs to address.

SNSMR’s Privacy Statement for Online Services continues to state only that:

Pursuant to a longstanding arrangement driver names and addresses are provided to The War Amps to enable its key tag program. Individual driver information is withheld from The War Amps upon request by a driver.
[Emphasis added]

Understanding of the amendment authorizing disclosure amongst the general public cannot be widespread. First, the policy statement cited above continues to make

reference to the “longstanding arrangement” and makes no reference to the new legislation. In addition, reference to the War Amps disclosure is found in two places: Service Nova Scotia Access to Business (A2B) Quick Reference User Guide, and the Service Nova Scotia Online Express Services Privacy Policy. On perusal of these sites, it is, in my opinion, information that would be considered “buried” and not available to the public at large in an open and transparent manner. There is also nothing in the licensing section of their webpage that advises drivers of the automatic disclosure of their personal information to War Amps, or their right to opt out. The Legislative Webpage last consolidated the *Motor Vehicle Act* in July 2011 so a person will not see the change unless s/he looks at the amendments. The changes also do not appear at www.canlii.ca a universally accepted site for research in Canada. There is also no notification of the change on the Website for SNSMR.

The change to the statute was not communicated to me until June 18, 2013, despite having continued to make inquiries that ended with a promise to keep me informed. If I do not know about this amendment, how could the general public have been expected to know?

Finding:

I find that SNSMR has failed to provide reasonable notice to the drivers of Nova Scotia of the change to the legislation allowing them to opt out. I find the gap in notification to registered drivers of Nova Scotia is problematic and requires immediate rectification.

Issue #4: Whether SNSMR has not and is not following privacy best practices by failing to prepare and publish a Privacy Impact Assessment [PIA]?

Whenever it collects personal information for one purpose and shares with an outside agency for another purpose [even with specific legal authority to do so], government needs to take reasonable care to ensure the information is protected and not misused. For example, what safeguards does the outside agency have in place to protect the personal information?

During the debate on Bill 125 this specific privacy implication was raised:

*(...) what insurance we're going to have to make sure that our lists of names and addresses (...) won't somehow or other find their way onto a mailing list someplace, which we're all very well aware of when you fill you name in at a store or something, all of a sudden **the mailing lists are sold, or given, or used for other purposes. I just want to know how the minister will guarantee that that won't happen in this case. (...) it is nice to know we'll have that protected anyway and to ensure that people's privacy is protected.*** [Nova Scotia, Legislative Assembly, Hansard, 61st Leg, 4th Sess, No 125 (13 November 2012) at 3644 (Keith Colwell)]
[Emphasis added]

The Minister for SNSMR responded as follows:

I don't know if any member in this House could come up with an incident where the War Amps inappropriately used people's information. I think it's unheard of. I think that they are an extremely reputable organization.
[Nova Scotia, Legislative Assembly, Hansard, 61st Leg, 4th Sess, No 125 (13 November 2012) at 3645 (John MacDonell)]

The credibility of the War Amps is not the issue and this Review Report is not intended to impugn or call into question the reputation or good works of the War Amps. My role as the independent privacy oversight body is to monitor the conduct of *public bodies* like SNSMR not charities.

The passage of Bill 125 does not relieve SNSMR from its responsibility to exercise due diligence when sharing Nova Scotia's personal information with outside organizations. It is my opinion that before SNSMR releases hundreds of thousands of names and addresses to the War Amps, it must be satisfied that the outside agency has appropriate privacy protections in place.

During this investigation, I solicited information from SNSMR about the War Amps which it provided to me on June 7, 2012. It is clear from the documentation provided that the War Amps CEO can attest to the steps they have taken to protect the personal information it gathers including its ISO [Information Security Management Systems] certification. Suffice to say, this demonstrates to me that the War Amps takes privacy seriously and appreciates the privileged position it enjoys in having access to this personal information collected by government. But the Review Officer in Nova Scotia has no authority over the private sector, profit or non-profit.

My authority is over public bodies. My continuing concern rests with what SNSMR has done or not done to fully evaluate the privacy implications of what it is doing. It is the role of SNSMR to explore and confirm the adequacy of the privacy protections the War Amps has in place. The Department's response to my offer to consult stated *we will continue to use our internal resources to ensure compliance with FOIPOP legislation*. SNSMR has not provided me with a Privacy Impact Assessment ["PIA"] despite my request to do so.

It is incumbent on SNSMR to document the privacy implications of its arrangement with the War Amps in a PIA thus the War Amps and the public understand the privacy protections in place. Ideally, a PIA is always prepared prior to a program being introduced.

The Government of Nova Scotia has a Privacy Policy contained at Chapter 4: Information and Records Management. Chapter 4.11 is entitled, "Privacy Policy". It reads, in part, as follows:

Policy Statement

The Government of Nova Scotia is committed to ensuring that government entities adhere to the privacy protection provisions of the Freedom of Information and

Protection of Privacy Act, the Personal Information International Disclosure Protection Act, the Privacy Review Officer Act, and other applicable legislation. Each government entity shall have policies and processes in place to manage and protect personal information at every stage of its life cycle, and shall identify a person responsible for privacy obligations.

Application

The policy applies to

- *all government entities*
- *all personal information in the custody or under the control of government entities*

The relevant policy directives that govern SNSMR are, as follows:

Policy Directives

9. Each government entity shall complete a privacy impact assessment, in accordance with the PIA template maintained by the Information Access and Privacy Office (Justice), for any new program or service, or for a significant change to a program or service, that involves the personal information.

10. A privacy impact assessment shall contain a risk mitigation strategy, the implementation of which shall be monitored by the government entity.

A helpful video and transcript about PIAs is available from the Office of the Privacy Commissioner of Canada.

The need for a PIA cannot be displaced by the Department relying on the organization's reputation for good works or being told of its ISO certification. The longstanding informal agreement to share personal information has been in place for a long time. Preparing a PIA will provide SNSMR with a fresh review of the privacy implications of the legally authorized ***but optional*** disclosure of personal information to War Amps.

Finding:

With the passage of Bill 125, however, I find the disclosure of personal information to the War Amps is authorized under a new statutory provision, which provides SNSMR with the perfect opportunity to assess the ongoing privacy implications of disclosing registered drivers' personal information with a charity by preparing and publicly releasing a PIA taking into account how to ensure notification to the driving public that they can opt out.

Recommendations

Pursuant to ss. 5(1)(b), (c), and (e) of the *PRO Act*, I make the following Recommendations to SNSMR:

1. Provide notice to all registered drivers in Nova Scotia that an amendment to the *Motor Vehicle Act* gives SNSMR legal authority to share drivers' personal information with the War Amps including by updating its Website to reflect the changes. Include in the notice the fact that the name and address of all registered drivers *have been and will continue to be shared* with the War Amps unless a driver chooses otherwise – *opt out*. Provide all existing registered drivers with user-friendly means to *opt out* of the War Amps Key Tag program: written notice, on-line or by telephone. Provide a copy of the notice to the Review Officer;
2. Amend the registration and re-registration documentation to apply for a driver's license to put all registrants on notice of s. 71A of the *Motor Vehicles Act* and their right to opt-out of disclosure to the War Amps. Preferred privacy practice would have the default being to opt out and require specific consent to opt in. Recognizing the public interest served by the War Amps program, however, I recommend the amendment to the registration and re-registration documentation should be formatted as a check box to *opt out* [default being to opt in]. Provide a copy of the modified registration forms to the Review Officer;
3. Prepare and make public the PIA on the disclosure of drivers' personal information to the War Amps to be completed well in advance of the next scheduled transfer of personal information [April 1, 2014]. Provide a copy of the PIA to the Review Officer; and
4. Complete the notification to existing registered drivers, modifications to the drivers registering or registering and the PIA within 6 months of these Recommendations. This will enable registered drivers and new drivers to receive notice of the changes and to make a decision whether or not to opt out or not. Compliance with Recommendations 1-3 inclusive with respect to providing copies to the Review Officer should include evidence the 6 month timeline to notify registered drivers has been met.

Yours truly,

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