REPORT

Nova Scotia Freedom of Information and Protection of Privacy Report of Review Officer Dulcie McCallum FI-07-27

Report Release Date: November 9, 2007

Public Body: Children's Aid Society Inverness – Richmond

Issue: Whether the Children's Aid Society Inverness – Richmond ["Society"] properly applied s. 20 of the *Freedom of Information and Protection of Privacy Act* in withholding the Record in its entirety.

Summary: An Applicant requested a copy of his/her personal information contained in a report in the custody of the Society. The Society subsequently notified all Third Parties requesting their permission to release the portion of the Record containing the Third Parties' respective personal information. After considerable delay and receiving responses from three Third Parties, the Society ultimately refused access to the Record citing s. 20 of the *Act.* The Applicant filed a Review Request and submitted that s/he was seeking access to his/her personal information and not any Third Party information. The Society advanced the position that the Record contained the personal information of Third Parties, was supplied in confidence and therefore should be withheld.

The Review Officer found that the Applicant is entitled to a copy of the Record with Third Party information removed.

Recommendations: 1. The Society should provide a copy of the Record pursuant to s. 5(2) of the *Act* with any and all identifying information of all Third Parties severed, other than the personal

information refe rring to the adult Third Parties who have consented to release;

2. Alternatively, where the information is prov ided in confidence, the Society must pr ovide a summary of the report made to the S ociety, in o ther words, a summary of the Record, pursuant to s. 20(5) of the *Act*. The statute provides that a public body 's duty to provide a summary wil l not apply when the s ummary cann ot be prepared if to do so wo uld reveal the identity of a Third Party. As an ora l summary has already been provided to the Applicant, presumably without jeopardizing any Third Parties identities, the Society is required to provide a summary of the Record, in writ ing;

3. With respect to Recommendations #1 and #2, having reviewed the Record carefu lly in its entirety, the Rev iew Officer believes that the Record is capable of be ing severed.

4. As a min imum, the Recor d is clearly capable of being summarized to provide the information to the Applicant.

5. The Soc iety adopt the format and wording of Form 1 available on the homepage of the Freedom of Information and Protection of Privacy Rev iew Office that w ill require an Applicant to choose between "an applicant's own pers onal information" or "other information" or bot h.

6. The Soc iety request the Department of Ju stice Information Access and Privacy Of fice (Freedom of Information and Protection of Pri vacy Coordinator), or whatever publ ic body is responsible for t raining Children's Aid Societ ies, to provide the people responsible for processing Appl ications for Access to a Record with comprehensive tra ining in access to information and privacy including but not l imited to

a. ensuring the Society has a copy of the FOIPOP Administrators Pol icy and Procedure Manual;
b. those resp onsible for the t raining considering including instruction on:
    i. The duty to assist an Applicant
    ii. How to determine what is w ithin the scope of a Record that is responsive to the Applicat ion for Access to a Record
    iii. The d istinct ion between an ap plicant's personal information and personal information about third parties
    iv. When t hird parties need to be g iven Not ice and when t hey d o not un der the *Act*
    v. How to sever a record to prov ide information to which an applicant is ent itled and remove any information that wo uld constitute an u nreasona ble inv asion of third parties' personal priv acy

vi. How to provide a summary of the personal information for an applicant if severing of a record is impossible
vii. How to describe the contents of a record to a third party without disclosing the contents of the actual record when soliciting their consent to disclosure

7. Apologize to the Applicant for the inordinate delay in processing this request for access to his/her personal information; delay caused by contacting Third Parties unnecessarily and delay resulting from failure to provide a complete Record to the Review Office in a timely fashion. This is particularly important given the sensitive nature of the events surrounding the report and the Applicant's explicit purpose in accessing his/her personal information – to bring closure to an unfounded report. Delay in such situations can exacerbate an otherwise reparable harm.

Key Words: apology, child protection, delay, describing the contents of the record, duty to assist, duty to report, notice or no notice to third parties, personal information, supplied in confidence, unreasonable invasion of a third party

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 2(a)(ii), 2(c), 3(i), 5(i), 5(2), 7(1)(a), 10(1)(c), 20(1), 20(2)(f), 20(3)(b), 20(4)(a), 20(5), 22(1)(b), 22(1A)(a), 25(1); Children and Family Service Act s. 23(1), 24(2)*

Case Authorities Cited: *Dickie v. Nova Scotia (Department of Health), 1999 CanLII 7239 (NS C.A.), (1999), 176 N.S.R. (2d) 333; Cyril House et al, Unreported, Court File #160555, NSSC; R. v. Ryan (1991), 107 NSR(2d) 357 (CA); Nova Scotia (Department of Community Services) (Re), 1999 CanLII 912 (NS F.O.I.P.O.P.), FI-99-64; BC Information and Privacy Commissioner Order No. 44-1995; Halifax Regional Police (Re), 2007 CanLII 12675 (NS F.O.I.P.O.P.), FI-06-71(M); House, Re, 2000 CanLII 20401 (NS S.C.), Cyril House (Abascus Security Consultants) 2000 NSSC; Metropolitan Toronto Police Services Board (Re), 1995 CanLII 6573 (ON I.P.C.), M-444*

Other Cited: FOIPOP Administrators Policy and Procedure Manual [Department of Justice]

REVIEW REPORT FI-07-27

BACKGROUND

On January 28, 2007, the Applicant made an Application for Access to a Record ["access request"] by submitting a Form 1 to the Deputy Minister of the Department of Community Services for the following:

> *Sometime between Dec 1st & Dec 18th a report has gone into child services in [town], by a [Third Party] or somebody in the [Third Party] at [Third Party] in [town] I'm requesting information regarding what the details were of that report sent to child services.*

On February 9, 2007, the Ministry of Community Services, pursuant to s. 10(1)(c) of the *Freedom of Information and Protection of Privacy Act ["Act"]* transferred the request to a Children's Aid Society Inverness - Richmond as the agency ["the Society"] who possessed custody and control of the responsive record. The Ministry of Community Services copied that letter to the Applicant.

On March 13, 2007, the Society advised the Applicant that they required a time extension to April 15, 2007. On March 21, 2007 another time extension letter was sent to the Applicant. This second letter indicated that the Society had identified that the information requested, if disclosed, may affect the interests or personal privacy of third parties under s. 20 or 21 of the *Act*, the Society required more time to comply with third party notices in s. 22 of the *Act.* In a letter dated March 21, 2007 the Society corresponded with the Third Parties advising them of access request and asking whether they objected or consented to the release of the information. The Third Parties were asked to provide their reasons under s. 20 or 21 of the *Act* if they objected to the release of the information.

There were seven Third Party notices sent out by the Society. Two adult Third Parties responded by providing their consent and one adult Third Party responded on behalf of her child to give consent. The remainder did not consent or respond. None of the Third Parties were employees of the Society. Employees of the Society do not fall within the definition a third party. Some of the Third Parties asked to view the Record to decide if they could consent but this request was simply refused by the Society. The Society's decision to contact all these Third Parties caused considerable delay in processing the Applicant's access request. The delay could have been avoided if the Society has made its intentions to withhold the Record in its entirety known at the outset, when the access request had been first received.

On April 13, 2007 the Society sent a decision to the Applicant advising that the Record would be withheld in its entirety, specifically under s. 20 (1), s. 20(2)(f) and s. 20(3)(b). The Society stated that the Applicant is not entitled to the requested Record for the following reasons:

1. Disclosure of the records is an unreasonable invasion of a third party's personal privacy, particularly taking into account the fact that the information was supplied in confidence; and
2. Disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy especially in a case involving a child welfare record where by their nature, are confidential records.

On April 13, 2007 the Society advised all Third Parties, including a child, that access to the information requested had been denied.

On April 16, 2007 the Applicant submitted a Request for Review of the by the Society's decision seeking access to the requested Record. The Applicant requested the Review for the following reasons:

> *On or before Dec 18, 2006 there was a report sent in to child services by the [Third Party . . . The report that was sent to child services was totally unwarranted and uncalled for. We have been going through due process with the Freedom of Information Act and the Privacy Act. We also were told in a registered letter that the request for records was refused by child services in [Town] due to Privacy Act. We also have a right to a review of the decision by a Review Officer. It is very important that we receive the report that was sent to child services so we can put closure and resolve of this issue, and put it all behind us, otherwise this will be always on the back of our minds. Thank you very much for your co-operation on this matter.*

The Request for Review was clear that the Applicant wanted information about the report that was sent to child services in order to put closure on the issue. The request did not include any other Record held by the Society. On April 24, 2007 our Office acknowledged receipt by correspondence to the Applicant and on the same date requested a complete copy of the Record from the Society that was responsive to the Applicant's access request.

There was considerable delay in obtaining the complete unedited Record from the Society who did not appear to understand that the entire Record responsive to the access request had to be provided to the Review Office without any portions severed. On May 7, 2007, the Society sent a copy of the Record but indicated that "entries had been removed." The Review Office contacted the Society and advised that if the Record it had first provided to the Review Office had anything removed that was responsive to the access request that a copy of the complete Record was to be forwarded to the Office. In due course, but after more delay, the Review Office was able to compile the entire Record from documents received from the Society. The Review Officer has reviewed the complete Record in the course of the Review.

Both parties were offered to attempt mediation as a means to resolve the issues. The Applicant agreed. The Society, however, in a letter dated August 13, 2007, stated that due to "difficult and complicated" issues, it took the position that the matter should proceed to formal Review.

Both the Applicant and the Society were asked for the representations at the outset of the formal Review process. Because the Society had already involved the Third Parties, the Review Officer contacted all of them inviting formal submissions in the Review. Only one was received, submitted on behalf of three of the Third Parties.

RECORD AT ISSUE

The Record at issue is the information recorded [case notes] by the Society on a child protection file. The Record was withheld in its entirety. No attempt was made by the Society to sever the identifying information of the Third Parties in order to provide the Applicant with his/her personal information. In addition, the Society took the position that no summary of the Applicant's personal information could be prepared without identifying the Third Parties who provided the information contained in the Record.

APPLICANT'S SUBMISSION

The Applicant has a right of access to any record held by a public body. Section 5 of the *Act* reads:

> *5(1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.*

Pursuant to s. 6 of the *Act*, the Applicant made a request in writing to the Department of Community Services, who transferred the request the Society, who had custody and control of the requested information.

In this case, the information in the Record involved personal information about the Applicant and others. Under s. 20 of the *Act*, it is mandatory for a public body to refuse disclosure if certain conditions are met.

> *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.*

The onus rests with the Applicant to demonstrate that there is no unreasonable invasion of a Third Party's personal information, if Third Party information is sought. , Where the Applicant is seeking only personal information about him/herself, the onus shifts to the public body to demonstrate that disclosure of the Applicant's information would be an unreasonable invasion of someone 's personal privacy.

On April 23, 2007, the Applicant filed a submission to the Review Officer reiterating the original Application for Access to a Record, which submission stated:

> *I [Applicant] [am] requesting all information that was sent to child services in [town] sometime in Dec 2006. The reason for my request is* ***to find out what was said about me. I feel the only way for me to put closure to this dilemma, is to***

find out what was said about me and my family. *If you have any questions please give me a call at [phone number].*
[Emphasis added]

I accept the Applicant's position that this request is for his/her personal information only and not any information about Third Parties. This request includes a person's views or a person's opinions about the Applicant, which are, by definition, his/her personal information and not the personal information of the person who expressed the views or opinions.

PUBLIC BODY'S SUBMISSION

The Society relied on two exemptions in its decision letter to the Applicant. First, the Society relied on s. 20(1) of the *Act* in refusing disclosure of the Record because to disclose the Record would be an unreasonable invasion of a Third Party's personal privacy particularly taking into consideration s. 20(2)(f) where the information has been supplied in confidence. Second, the Society relied on the reasoning in a prior decision of the Review Officer *[FI-99-64]* to refuse the Record because it contained personal information that is presumed to be an unreasonable invasion of a Third Party under s. 20(3)(b) of the *Act*.

Where the onus is on the public body to justify withholding a Record, the public body is required to provide reasons for any denial of access to a request for information. No reasons were given to the Applicant by the Society in this case for the refusal of the entire Record, other than to cite s. 20 of the *Act*.

In its formal submission to the Review Officer, the Society made the arguments summarized below:

1. The Record could be broken down into the following classes of information;
    a. Third party identifying information (names, occupations, situations or locations)
    b. Third party observations of the Applicant and two of the other Third Parties, one being a child
    c. Information on family status and medical information about a child
    d. Information about services provided to a child
    e. Family and employment status information about the Applicant, one of the other Third Parties, and a child
    f. Expression of concern regarding disclosure
2. The information about the Applicant falls into two categories;
    a. Information already in the possession of the Applicant some of which s/he supplied to the Society
    b. Information shared by the Society with the Applicant in an interview setting.

The Society took the position that much of the information - family status, service provision, medical and employment, is already in possession of the Applicant. Third party observations of the Applicant have already been provided to the Applicant during

the course of the investigation interview that followed the referral. There was no action taken after the investigation following the report, the subject of the requested Record.

To justify withholding Third Party information on the Record, the Society, through its lawyer, relied on the three-step process set out in *Dickie v. Nova Scotia [NSCA]* in its submission and summarized that process by asking the following three questions:

1. Is the record "personal information" within the meaning of the Act?
2. If so, is disclosure of the personal information presumed to be an unreasonable invasion of personal privacy? and
3. In all the relevant circumstances, is disclosure an unreasonable invasion of personal privacy?
   [Emphasis in the Society's submission]
   [*Dickie v. Nova Scotia (Department of Health)*, 1999 CanLII 7239 (NS C.A.), (1999), 176 N.S.R. (2d) 333, at para 6]

The Society's submission summarized answers to these questions, in relation to what it assumes to be a request for access to personal information about Third Parties that is contained in the Record, as follows:

1. Personal information is defined in the Act and relying on a reference in the *Dickie* decision, are words that are not limited by the examples in the Act and are "undeniably expansive." Section 20 of the Act imposes a duty on public bodies not to disclose information if to do so would be an unreasonable invasion of third party's personal privacy. The Society acknowledges that some of the information falls within the definition in s. 3(1)(ix) of the Act; an individual's personal views or opinions about someone else is not personal information of a Third Party. The Society then proceeds to Step 2 having found [at least some of the information] is Third Party information;
2. In answering Question #2, the Society argues that under s. 20(2) of the Act, in deciding if personal information is subject to privacy protection, all relevant considerations should be considered and in this case because:
   a. Unfairly exposed to financial or other harm
   b. Personal information supplied in confidence
   c. Disclosure may unfairly damage the reputation of the person making the report

   [The details of the justification for reliance on these three particular factors provided by the Society will not be repeated here, as to do so, would inappropriately disclose information. Suffice to state, however, that the arguments made by the Society were theoretical ones under the statute and were not based on any evidence provided by the Society to justify reliance on these three factors. The relevant points will be discussed in the Discussion below.]
3. The Society argues, in answer to Question #3, that the scales should be tipped in favour of non disclosure and that the onus rests with the Applicant to prove otherwise. The Society makes the following points:

a. The Act does not require the Applicant to identify the reason for asking for the information and its intended use. Reliance is placed on a Nova Scotia Supreme Court ["NSSC"] case to argue that intended use would be relevant consideration:

> *Intended use would, I think, always be a relevant circumstance to consider under s. 20(2), and where that use directly serves an element of the complex purpose of the Act, that circumstance would favour disclosure. The same value could not be assigned to a legitimate use that had profit as its purpose.*
> *[Cyril House et al, Unreported, Court File #160555, NSSC]*

b. No protection proceeding has resulted from the report so the Applicant is not exposed to jeopardy as a result of the information in the Record. The Society goes on to say how if this was before the courts a Judge could control the use of information but in this Review no such safeguard exists. Privacy of the Third Parties would be lost once the information was disclosed.
c. In considering all the relevant circumstances, the fact that this is Third Party information in a child welfare context should be compelling. Reports are mandatory and no person acting under a duty to report should be inhibited from doing so because their identities might later be made known. This would have a chilling effect on the child protection process. The Society argues to give out information about the circumstances surrounding the Report will identify the Third Parties thus breaching their privacy.

The Society's submission focuses a great deal of its attention on the problems associated with revealing the identities of the Third Parties, discussing concerns about repercussions to them personally if their identities are disclosed to the Applicant. The Society argues that because the Third Parties are not employees of the Society, any information about them should not be released by it, despite the fact that the Record, which is the subject of the access request, is a Record of this public body.

In its submission, the Society argued that the case of *R. v. Ryan* was instructive in this regard. That case was about a claim of privilege over child protection files by the Ministry of Community Services, where a person had been accused of sexual assault and trafficking in narcotics. The child protection files were the files of the children who were the alleged victims of the crimes. The Nova Scotia Court of Appeal stated the files were not privileged overturning the lower court because all four of the Wigmore on Evidence criteria could not be met on the facts. Those criteria are:

(1) The communications must originate in confidence that they will not be disclosed.
(2) *This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties.*
(3) *The relation must be one which in the opinion of the community ought to be sedulously fostered.*

(4) *The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.*

Only if these four conditions are present should a privilege be recognized. [R. v. Ryan (1991), 107 NSR(2d) 357 (CA), at p. 360]

The applicability of the *Ryan* case will be in the Discussion below.

The last point raised in the Society's submission is that the Record is not amenable to reasonable editing [or severing] and that the Applicant has already been provided with a summary by the Society orally during an interview with him/her.

The Society's submissions will be reviewed in the Discussion that follows.

DISCUSSION:

First and foremost this is a request by the Applicant to access personal information. Personal information is defined in s. 3(i) of the *Act*, the relevant portion of which reads as follows:

> *(i) personal information means recorded information about an identifiable individual, including*
> *(i) the individual's name, address or telephone number, . . .*
> *(iii) the individual's age, sex, sexual orientation, marital status or family status, . . .*
> *(viii) information about the individual's educational, financial, criminal or employment history, and*
> *(ix) anyone else's opinions about the individual, and*
> *the individual's personal views or opinions, except if they are about someone else;*

The purpose of the legislation is set out clearly in the *Act* and the relevant portion reads as follows:

> *2 The purpose of this Act*
> *(a) to ensure that public bodies are fully accountable to the public by…*
> *(ii)* ***giving individuals a right of access to, and a right of correction of, personal information about themselves***
> *(c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies* ***and to provide individuals with a right of access to that information.***

The Society appears to have misunderstood or mischaracterized what the Applicant was seeking. The Applicant has made it clear that this access request is for information about the child welfare report and his/her personal information in that report, and not information about any Third Party. Because the Applicant's request for access is for personal information, s. 22 of the *Act* has no applicability. The Third Parties did not

need to be contacted or given notice pursuant to s. 22 unless the Society had decided to release the whole Record – the Applicant's personal information and the information of the Third Parties. In the case of the latter, pursuant to s. 20, it is mandatory for the public body to give notice to the Third Parties. This access request, however, was about personal information about the Applicant so no notice was necessary. This confusion may have arisen in part because of the way in which the Form 1 provided to the Applicant by the Society did not have a place for an Applicant to indicate that the request was for personal information.

In a case where an access request is for personal information, the relevant portion of the *Act* reads as follows :

> *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 the relevant circumstances, including whether*
> *(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*
> *(b) the personal information was compiled and is identifiable as part of an investigation into possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;*

Section 20 is a mandatory exemption that imposes a statutory duty on head of the public body to refuse access if the section applies. The Society relied on s. 20(3)(b) of the *Act.* The Society cited s. 20(3)(b) in its final decision not to release any portion of the Record to the Applicant. However, in its submission to the Review Officer it did not provide any rationale for the applicability of that subsection. Section 20(3)(b) of the *Act* is often argued in conjunction with the law enforcement exemption, s. 15 of the *Act*, but in this case, the Society did not place any reliance on that section.

Section 20(4) of the *Act* provides a list of situations where disclosure would not constitute an unreasonable invasion of privacy, the relevant paragraphs provide:

> *20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if*
> *(a) the third party has, in writing, consented to or requested the disclosure;*

As the Society did not give the Applicant any portion of the Record, it is somewhat confusing as to why it felt the need to contact the Third Parties. One explanation may be that the Society may have believed that if all of the Third Parties consented, the whole of the Record could be released. But that was only with respect to their personal information. Consent was received by two parties and consent was given on behalf of a minor Third Party by a custodial parent Third Party. In any event, even

though asked, the Society appears to be unprepared to give any information to the Third Parties to enable them to appreciate how their privacy may be impacted by what was contained in the Record; therefore, obtaining consent from all of them was unlikely.

In addition, from the outset, the Society knew one of the Third Parties was a child and in its submission took the position that a custodial parent cannot provide substitute consent for a child in a child welfare context therefore consent from at least one Third Party could never be obtained. I make no finding with respect to whether the Society's argument vis a vis consent from a child and his or her parent in this case, as it is unnecessary to the outcome of this Review about access to a Record.

If the public body had no intention of releasing any portion of this Record, the Society did not need to contact the Third Parties. Section 22 stipulates the role of a public body in being required to give notice to Third Parties but also provides in s. 22(1A) as follows:

> *22(1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the third party a notice…*
> *(1A) Notwithstanding subsection (1),* ***that subsection does not apply if***
> *(a) the head of the public body decides, after examining the request, any relevant records and the views or interests of the third party respecting the disclosure requested,* ***to refuse to disclose the record****;*
> ***[Emphasis added]***

The public body did in fact contact the Third Parties. Some Third Parties consented in writing to the release of the information or reference to their name. Others did not consent or did not respond at all. The Third Parties are not entitled to know who the Applicant is, nor are they able to see the information that is the subject of the access request. Their consent if provided, therefore, is meaningless as they have no idea what information they are consenting to the release of, other than their name. That is why the legislation makes provision for a public body to give some information to the Third Parties to assist them in deciding whether or not the release of information would breach their personal privacy. The relevant section reads:

> *22(1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the third party a notice*
> *(a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests of invade the personal privacy of the third party;*
> *(b)* ***describing the contents of the record;***
> ***[Emphasis added]***

A few of the Third Parties asked the Society to provide them with the opportunity to review the reference to them in the Record. The Society's response to them reads as follows:

> *I acknowledge your letter of April 10, 2007, received the same date. I would note the [Society] is not in a position as a result of privacy legislation to provide the information you request.*

Some of the Third Parties made submissions to the Review Officer. Included in their submission was a statement that was additional evidence that the Society did not provide a description to assist the Third Parties in their decisions under s. 22(1)(b) of the *Act*. Their submission stated:

> *I understand that the identity of the applicant and the information to be disclosed is anonymous. This places us in an uncertain predicament. Being a third party, we are not privy to the information and whether or not it adequately reflects the information that we provided…*
> *Release of unknown information to unknown persons can put each of us at risk of harm, physically or otherwise. Therefore it remains our position that without disclosure to us who is seeking this information and what that information is, we can not [sic] consent to release of information to the applicant through the Children's Aid Society Inverness Richmond.*

The Society appears to have been unable to find the correct balance between the duties to assist the Applicant pursuant to s. 7(1)(a) of the *Act* and the duty to report pursuant to ss. 23 and 24 of the *Children and Family Services Act ["CFS Act"]*. These sections read:

> *Freedom of Information and Protection of Privacy Act ["the Act"]*
> *7(1) Where a request is made pursuant to this Act for access to a record, the head of the public body to which the request is made shall*
> *(a) make every reasonable effort to assist the applicant and to respond without delay to the applicant openly, accurately and completely;*

> *Children and Family Services Act ["the CFS Act"]*
> *23(1) Every person who has information, whether or not it is confidential or privileged, indicating that a child is in need of protective services shall forthwith report that information to an agency.*

The Society to whom the report was made, the report which is the subject of the access request, falls within the definition of agency under the *Act*. It is an offence punishable by summary conviction if a report is not made where there is a reasonable suspicion of child abuse. It is not an offence to submit a report unless the complainant has done so falsely and maliciously. While s/he alleges there may be false information contained in the Record, the Applicant has made no allegation or supplied evidence that the report was made maliciously. The Applicant has no way of knowing the extent of any errors or false information, as s/he has not been given any portion of the Record. Sections 23 and 24 of the *CFS Act* provide for the offences in cases where a report of

abuse is made "falsely ***and*** maliciously" but these words must be read conjunctively in order for the punitive section of the *CFS Act* to apply – meaning the report must be both false and malicious.

The Review Officer has had a similar case where an Applicant wanted information about a complaint made about him/her including the report and investigation *[FI-99-64]*. In addition in that case, however, the Applicant sought the name of the person who submitted the complaint. Consistent with the right to access information held by a public body pursuant to s. 5 of the *Act*, that Applicant had been provided with a severed copy of the Record. In that case, the public body, the Department of Community Services, denied access to the name of the complainant pursuant to s. 20 of the *Act*. The Review Officer stated:

> *The Applicant was told that the name of the person who submitted the complaint was being withheld because it "relates to child welfare matters, and it is important that individuals be able to provide information to social workers in respect of child protection matters" with the assurance of confidentiality. The Department said that "[t]he ability to provide information confidentially is essential to ensure that individuals who have information about the abuse or neglect of children" can come forward and report it.*
> *[Nova Scotia (Department of Community Services) (Re), 1999 CanLII 912 (NS F.O.I.P.O.P.), FI-99-64, at p. 2]*

It is imperative in pursuing the purpose of child protection legislation – reporting, preventing and investigating abuse and neglect of children – that individuals and professionals when they comply with the statutory duty to report do so knowing that their identities will remain confidential. This is an essential feature of child protection legislation and understandably one that responsible agencies and departments, such as the Society, take extremely seriously.

In a case from another jurisdiction involving a child protection matter, another instance where the public body had made an attempt to sever the Record, the Commissioner emphasized the importance of confidentiality with respect to the reporting of alleged child abuse when he stated:

> *I fully accept the argument of the Ministry that the release of information in child abuse investigation files to the person who has been accused would have a "chilling effect… on encouraging children and others to reveal their knowledge of the abuse…" I am satisfied that the Ministry "has attempted to provide the applicant with portions of the records that will help the applicant to understand the nature of the complaint against him." However, it does not wish to release so many details that the identities of those who provided the information may be revealed.*
> *[BC Information and Privacy Commissioner Order No. 44-1995, at p. 4]*

In the case at hand, the Society was correct in wanting to protect the identities and information about Third Parties contained in the Record. The Society, in this case,

however, made no attempt to sever the Record to enable the Applicant to have access to his/her personal information.

The Society argued that the *Ryan* case should apply here. Clearly the *Ryan* case is distinguishable on its facts. It is a criminal case involving an accused person seeking access to the child protection files of his alleged victims. The Court held that in finding the balance under the competing interests under the fourth criterion – society's interest in pursuing a charge of sexual assault of a young woman and diligently prosecuting narcotics offences on the one hand, and, society's concern with maintaining confidentiality in cases involving the protection of children. The Court of Appeal found it inappropriate to imprint the claim of privilege upon the child protection files particularly here where the files are about the victims who have an interest in pursuing the charges.

The *Ryan* analysis, however, is helpful. Turning now to the case at hand, the Review will take each of the criteria separately beginning with communication in confidence. Despite the fact that on the intake form of the Record the box asking Confidential yes or no is ticked "No", the Review Officer regards the information on the Record as a child protection 'report' given in confidence, thus meeting the first criteria.

The second criterion involves the relations between parties. In this case, paramount consideration should be given to the relationship between the Society as the depository of reports about children potentially at risk of abuse and potential reporters as people under a duty to report any suspicion of risk. Some consideration must also be given to the relationship between the Applicant and his or her relationship with the Society.

The third criterion requires that the community would opine that the relationship between reporters and the Society should be sedulously fostered or, in other words, diligently maintained. Clearly this criterion would be a strongly held opinion in the community.

With respect to the fourth criterion, this case is distinguishable as there is no litigation involved. The report was investigated and that put an end to the matter as being unfounded. Had the matter proceeded to a hearing, disclosure of the information on the Record would possibly still be in order, because of the many safeguards in court proceedings as outlined in the *Ryan* case on p. 361.

Had the Applicant been seeking access to the whole Record including the personal information of the Third Parties, applying the Wigmore on Evidence criteria, as the *Ryan* case refers to them, may have had a different result. But in this case, where the access request is for personal information and the report was unfounded, no injury would inure to the relation by the disclosure. In fact, the failure of the Society to honour the Applicant's right to his own personal information may have more of an injurious effect on the relationship than to withhold.

A recent Review Report of this Office discussed when personal information should be disclosed, even where the information has been supplied by a Third Party in confidence, which reads:

> *A person's right to access **their own personal information supplied by a Third Party** cannot be denied simply because the person supplying it believes it was in confidence.*
>
> > *"It appears that the Legislature has, in s. 3(1)(i)(ix) [s. 461(f)(ix)], come to grips with one aspect of a clash inherent to a legislative scheme that attempts to balance access to information and protection of privacy. The clash arises where one person addresses a public body about another. The person who is the subject of the communication may have an interest in knowing what information was given, and the person also has a privacy interest at stake if others seek access to a record of the communication. The person who provided the information may also have a privacy issue at stake, where, for example, the information was provided in confidence. The interests of the two are mutually exclusive. The effect of the [section] is to come down on the side of the person spoken about where the information is a personal view or opinion about that person. Thus, if one asserts fact about another and the information is records, it is "recorded information about an identifiable individual." [French v. Dalhousie University (2002), NSCS 22 (CanLII), at para 17].*
>
> *[Halifax Regional Police (Re),* 2007 CanLII 12675 (NS F.O.I.P.O.P.), FI-06-71(M), *at p. 7]*
> *[Emphasis in the original]*

The Society placed reliance on an unreported decision of our Nova Scotia Supreme Court arguing that the in considering all the relevant circumstances to decide the balance between privacy and access, one of the considerations should be what the Applicant intends to do with the information. The case relied upon by the Society to advance this argument, *Cyril House et al,* provided a list of factors to be considering in assessing under s. 20(1) of the *Act*, which stated:

> *I have identified the following subjects for consideration in assessment now required: the possible uses and misuses of the information sought by Mr. House, which includes consideration of the regulation of private investigators and restrictions about their use and disclosure of information, and consideration of Mr. House's business purpose for the information in distinction from the public purpose of the Act; …and, any reasonable expectation of privacy on the party of the unidentified owner of the plated vehicle.*
> *[House, Re*, 2000 CanLII 20401 (NS S.C.), *Cyril House (Abascus Security Consultants) 2000 NSSC, at p. 8]*

This case is totally distinguishable and has no application to this case. In the *Cyril House et al* decision, the applicant was a private investigator seeking the names associated with particular motor vehicle licence plates. He was seeking personal information about third parties not his own personal information. When, as here, the

Applicant has requested access to his/her own personal information, the reason for doing so and what the Applicant intends to do with the information is a completely irrelevant factor for a public body to consider. If this was a relevant factor to be considered under right to access personal information legislation, the *Act* would have made provision accordingly.

The public body has a duty to assist the Applicant and to seek clarification from the Applicant as to exactly what information formed the access request. Had that been done in this case, the Society would have been able to clarify that the Applicant wanted information about the report made about him/her and his/her personal information and was not seeking access to the identities of Third Parties or any of their personal information.

Where the information requested is only in part subject to an exemption, the public body must, where it is severable, provide disclosure to the remaining information that is the subject of the access request pursuant to s. 5(2) of the *Act*.

> *5(2) The right of access to a record does not extent to information exempted from disclosure pursuant to this Act, but if that information can reasonable be severed from the record an applicant has the right of access to the remainder of the record.*

The Society argued that the personal information of the Applicant need not be released because on the one hand, the Applicant knows what it is because s/he provided it and on the other hand, the remainder information was provided to the Applicant orally by the Society during an interview. Similar arguments were made in a BC order, cited above, which held:

> *I note, for the record, that certain severing practices of the Ministry are inappropriate. Even though certain information is known to the applicant, "the Ministry will not release this information as the Ministry has no control over what an applicant will do with that information. While an applicant may be able to 'fill in the blanks,' any other person coming into possession of the records would not be able to identify the people involved. By way of this policy, the Ministry believes that it is protecting individuals from an unreasonable invasion of their person privacy." The Ministry "hopes to prevent the use of documents by the press and other parties that are not directly involved in a particular matter."…*
>
> *I find this practice to be an inappropriate application of the Act, since, under section 4(1), an applicant has a right of access to records including certain personal information concerning himself. In addition, under section 22 of the Act, it is not an unreasonable invasion of the personal privacy of third parties to release to an applicant personal information that he or she originally supplied to government. Moreover, just as the applicant's reasons for wanting access are officially irrelevant to the processing of a request for access, so what the applicant may do with the product of his or her access request is beyond the responsibility and control of a public body. It is an improper application of the Act, in my judgment, to sever information about a person from a record about*

himself or herself that he or she has a right of access to under the Act, particularly where the person is already aware of the severed information. [BC Information and Privacy Commissioner Order No. 44-1995, at p. 6]

In addition, the Society argues that in making a determination by considering all the relevant circumstances, what the Applicant intends to do with the information should be a consideration.

Like the Commissioner in that case, I am persuaded that to allow the arguments of the Society in this case to stand leads to an absurd result that thwarts the very purpose of the *Act.*

However, it is an established principle of statutory interpretation that an absurd result, or one that contradicts the purposes of the statute in which it is found, is not a proper implementation of the legislature's intention. In this case, applying the presumption to deny access to information which the appellant provided to the Police in the first place is, in my view, a manifestly absurd result. Moreover, one of the primary purposes of the Act is to allow individuals to have access to records containing their own personal information, unless there is a compelling reason for non-disclosure. In my view, in the circumstances of this appeal, non-disclosure of this information would contradict this primary purpose. [Metropolitan Toronto Police Services Board (Re), 1995 CanLII 6573 (ON I.P.C.), M-444*, at p.3]*

The Society also relied on a decision of my predecessor in Review Report *FI-99-64*. This case is worthy of note because it is an access request in the child welfare context. Importantly, it dealt with a severed copy of a Record where the Applicant had been given access to his/her personal information but was refused the identities of the complainants in a child protection matter. It is clearly distinguishable as this Applicant did not receive any portion of the Record and was not seeking the identities of the Third Parties. It is unclear as to why the Society relied on this as it would have only supported their case if the Applicant had received his/her personal information and only been denied access to Third Party information.

I disagree with the Society on all three points. To allow a public body argue that the Applicant knows what is on the Record, in part, because s/he provided the information and/or to allow a public body to refuse access to an Applicant because it recited their version of his/her personal information on the Record during an interview, in both instances, leads to an absurd result and is rejected. Why the Applicant wants access to his/her personal information and what s/he intends to do with it after receiving it, is not a relevant consideration in this case.

The *Act* outlines in detail the purpose of the legislation. The relevant portion of s. 2 reads:

2 The purpose of the Act is
(a) to ensure that public bodies are fully accountable to the public by

*(v) providing for an **independent review of decisions** made pursuant to this Act;*

The Applicant is entitled to an independent review of a decision with respect to the Application for Access to a Record. There is no way to review an oral version of the Record provided to the Applicant in an interview. The *Act* does not provide for an oral recitation to replace written documentation held by a public body. For the Society to claim it can provide access to personal information by providing an oral summary means the Review Officer cannot review the Record provided to the Applicant, which is wholly inconsistent with a fundamental purpose of the *Act*. To provide personal information in this way allows a public body to abrogate its responsibility to the Applicant and thwarts the purpose of the *Act* for independent Review.

The Society had a number of options with respect to responding to this access request pursuant to s. 20 of the *Act*. These included the following:

1. The Society could have severed the Record deleting all references to the names of the Third Parties and providing the Applicant with his/her personal information. The portion of the information to which the Applicant did not have the right to access is reasonably severable;
2. The Society could have provided the entire Record or a large portion of it including the names or reference to personal information in the case of the Third Parties who provided their consent in writing;
3. The Society could have shown each of the Third Parties the portion of the Record that only related to that person, without breaching anyone else's privacy, and sought their consent to the release of that portion of the Record. Thereafter, the Society could have compiled all the sections that had been agreed to and released that to the Applicant along with his/her personal information.
4. Where the information is provided in confidence, which in this case is an important factor to consider, the Society can refuse access to the Record but should give the Applicant a summary of the information when doing so would not invade any other person's privacy;
5. The Society has the authority to allow a Third Party or Parties to assist or prepare in the summary of personal information, where it is their personal information if it is to be included in the summary.

The last point raised by the Society was regarding its opinion as to whether it could sever or summarize the Record. The submission that the Record is not amenable to being severed is rejected, as discussed above.

In the other half of that argument, the Society states that the Applicant has already been provided a summary during the course of an interview. It is curious how the Society believes it can share the details of the information in an interview in a way that does not jeopardize the interests of any Third Party while at the same time refuse and state it is impossible to provide a written summary of the Record. Clearly, the Society has demonstrated through its own conduct that the information on the Record can be summarized without compromising any Third Party interests.

The *Act* provides the Applicant with a statutory right to access to a copy of information held by a public body upon request. Replacing written documentation to which the Applicant is otherwise entitled with the Society's verbal summary of it does not meet the requirements of the statute. At the very least, the Applicant is, in such circumstances, entitled, as the word "shall" imposes a duty on the Society, to a written summary of the Record, as contemplated by the *Act* where it states :

> *20(5) On refusing, pursuant to this Section [Personal Information], to disclose personal information supplied in confidence about an applicant, the head of the public body* ***shall give the applicant a summary of the information*** *unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.*
> *[Emphasis added]*

The Applicant also has the ability under the *Act* to correct any information held by a public body, which s/he believes to be inaccurate, false or incorrect. This provision reads:

> *25(1) An applicant who believes there is an error or omission in the applicant's personal information may request the head of the public body that has the information in its custody or under its control to correct the information.*

In this case, the Applicant claims there may be lies or inaccuracies in the Record, which s/he would like to correct. In order for an Applicant to do so, however, it is necessary to gain access to his/her personal information held by or under the control of a public body.

INTRODUCTION TO FINDINGS AND RECOMMENDATIONS:

Only public bodies can provide access to a Record. That role is given to public bodies under the *Act.* The role of the Review Officer is to review public body decisions to determine whether or not the decision has been made in accordance with the *Act.* The Review Officer reviews the complete Record that is the subject of the access request and receives and considers all submissions from applicants, public bodies and third parties. The Review Officer then makes findings and recommendations to the public body. The public body considers the findings and recommendations and ultimately agrees or disagrees. It is the public body that makes the final determination as to what information is shared with an applicant.

In this case, my Findings and Recommendations are as follows:

FINDINGS:

1. The request for access to information was a request for the Applicant's personal information contained in the Record of the Society.
2. There are seven Third Parties including one child. The Applicant is not entitled to know the names, identities, agency affiliations and other personal

information about any of the Third Parties. In no case is an applicant entitled to know the identities of any third parties, including during the processing of the access request with the public body or during the review process with the Review Office.

3. If this was a case about access to Third Party information, the Society was correct in arguing that information given in confidence and that could result in exposure to harm are factors to consider under s. 20. The majority of this case, however, is not about Third Party information. This Review Report has attempted to duly consider the arguments advanced by the Society in that respect.
4. The subject of the Report received by the Society, the Record, concerned something in which the Applicant was involved that led to the Third Party[ies] feeling obliged to report. A large part of the information on the Record is personal information to which the Applicant is entitled.
5. There was no evidence submitted to support the Society's contention that the reputations or interests of any of the Third Parties would be in jeopardy as a result of disclosure to the Applicant. The detailed argument regarding potential concerns in the context of child welfare may apply in another case but was, in this case, clearly theoretical and in no way related to this particular situation on the facts. Any argument that providing the Applicant with his/her personal information would unfairly damage the reputation of any of the Third Parties is rejected. There is not a scintilla of evidence for the potential of any harm.
6. There is little information on the Record, other than names that are amendable to being severed, that fall within the definition of personal information about a Third Party.
7. By the Society's own admission and behaviour with respect to the interview held with the Applicant, the information on the Record is clearly amenable to being summarized without compromising any Third Party interests.
8. The Society's suggestion that telling the Applicant orally about what is contained in the Record is an equitable substitute for giving the Applicant access to his/her personal information contained in a Record is completely unacceptable.
9. The Society cannot meet its duty as a public body to provide access or comply with the purpose of the *Act* with respect to the right to an independent review, by refusing access because an Applicant supplied the information s/he is looking for as recorded by the public body or because the Society has provided it orally.
10. If, as here, the Record is recorded personal information to which the Applicant is entitled, why the Applicant wants his/her personal information and what s/he intends to do with it, are irrelevant. In this case, the Applicant indicated the reason for wanting it – to put closure on this unfounded report. Also, the Applicant may want a correction of personal information if it proves to be inaccurate. In any event, the Society did not provide any evidence whatsoever that the Applicant intends to do anything inappropriate with the information.
11. Confidentiality is a key component in the context of child welfare. Confidentiality of the Third Parties can still be protected; however, particularly where there are many Third Parties, while at the same time

respecting an Applicant's right to access personal information in the custody of a public body. The *CFS Act's* confidentiality provision cannot be treated as if it automatically trumps the *Act's* right to access. Had the Legislature intended this to be the case, the *CFS Act* would have be included in s. 4A(2) of the *Act.*

12. Where the access request is for the Applicant's personal information and the child welfare report was unfounded, no injury would inure to the relations between the Society and the Third Parties by the disclosure.
13. The failure of the Society to honour the Applicant's right to his own personal information may have more of an injurious effect on the relationship between the Society and the Applicant than to withhold.
14. If the Society misunderstood the nature of the request for access when first received, believing the Applicant wanted the entire unsevered Record, it is incumbent on the public body pursuant to the duty to assist to ensure it understands what the Applicant wants. In any event, this potential for misunderstanding would have been completely clarified during the course of the investigation phase at the Review Office.

RECOMMENDATIONS:

1. The Society should provide a copy of the Record pursuant to s. 5(2) of the *Act* with any and all identifying information of all Third Parties severed, other than the personal information referring to the adult Third Parties who have consented to release;
2. Alternatively, where the information is provided in confidence, the Society must provide a summary of the report made to the Society, in other words, a summary of the Record, pursuant to s. 20(5) of the *Act*. The statute provides that a public body's duty to provide a summary will not apply when the summary cannot be prepared if to do so would reveal the identity of a Third Party. As an oral summary has already been provided to the Applicant, presumably without jeopardizing any Third Parties identities, the Society is required to provide a summary of the Record, in writing;
3. With respect to Recommendations #1 and #2, having reviewed the Record carefully in its entirety, the Review Officer believes that the Record is capable of being severed.
4. As a minimum, the Record is clearly capable of being summarized to provide the information to the Applicant.
5. The Society adopt the format and wording of Form 1 available on the homepage of the Freedom of Information and Protection of Privacy Review Office that will require an Applicant to choose between "an applicant's own personal information" or "other information" or both.
6. The Society request the Department of Justice Information Access and Privacy Office (Freedom of Information and Protection of Privacy Coordinator), or whatever public body is responsible for training Children's Aid Societies, to provide the people responsible for processing Applications for Access to a Record with comprehensive training in access to information and privacy including but not limited to:

a. ensuring the Society has a copy of the FOIPOP Administrators Policy and Procedure Manual;
b. those responsible for the training considering including instruction on:
    i. The duty to assist an Applicant
    ii. How to determine what is within the scope of a record that is responsive to the Application for Access to a Record;
    iii. The distinction between an applicant's personal information and personal information about third parties
    iv. When third parties need to be given Notice and when they do not under the *Act*
    v. How to sever a record to provide information to which an applicant is entitled and remove any information that would constitute an unreasonable invasion of third parties' personal privacy
    vi. How to provide a summary of the personal information for an applicant if severing of a record is impossible
    vii. How to describe the contents of a record to a third party without disclosing the contents of the actual record when soliciting their consent to disclosure

7. Apologize to the Applicant for the inordinate delay in processing this request for access to his/her personal information; delay caused by contacting Third Parties unnecessarily and delay resulting from failure to provide a complete Record to the Review Office in a timely fashion. This is particularly important given the sensitive nature of the events surrounding the report and the Applicant's explicit purpose in accessing his/her personal information – to bring closure to an unfounded report. Delay in such situations can exacerbate an otherwise reparable harm.

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