

Future Needs - Recommended Directions:

The Freedom of Information and Protection of Privacy Act

**A Submission to the Freedom of Information and Protection of Privacy Advisory
Committee on Behalf of N.S. Government FOIPOP Administrators**

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June 27, 2003**

1. Introduction

Thank you for the opportunity to make a submission for the Nova Scotia Government to the *Freedom of Information and Protection of Privacy Act* Review Committee.

Background

The submission is made on behalf of some sixty-plus *Freedom of Information and Protection of Privacy Act* Administrators within the departments, offices, agencies, boards, and commissions of the N.S. Government. FOIPOP Administrators perform their work with integrity and dedication to the spirit of access and privacy protection that is a hallmark of Nova Scotia's legislation which the courts have labeled the most open in the country. FOIPOP administrators must daily balance the access rights of applicants with the privacy rights of individuals and the need for confidentiality of sensitive government information in accordance with the provisions of the *Act*.

The submission represents the work of a small core of FOIPOP Administrators over several weeks, and a peer review by a committee of all FOIPOP Administrators. It reflects for many Administrators almost ten years of experience in processing and responding to requests for information, as well as notifying and relating to third parties whose interests are affected. Although there has been a more informal approach in Nova Scotia to the processing of applications, and communicating with applicants and third parties, levels and standards of service have been at comparable levels to other Provinces and Territories. This has been achieved in Nova Scotia despite the fact that some of these other jurisdictions have far greater financial and human resources to administer the *Act*.

In short, we believe that despite the occasional anecdotal complaints from those making submissions to FOIPOP Advisory Committee, the *Act* is administered with competence, fairness, and with due regard to the rights of applicants and the obligations of the N.S. Government under the legislation.

Evolution

The FOIPOP assignment, has been for the vast majority of FOIPOP Administrators a part-time task in the context of other duties. When the *Act* was proclaimed in 1994, FOIPOP responsibilities were seen as something that could be accommodated in addition to other tasks. The position of the Review Office was also viewed by the government as a part-time task occupying no more than a few days a week. However, the volume of applications, although somewhat less in the last year, is still about three-fold that of the annual average in the first two years. Applications are now more complex and detailed as applicants seek greater amounts of material related to various issues, or themselves. Finally, the issue of personal privacy that was not prominent in the initial years, has become a more significant issue where policies and procedures relating to government held personal information require more detailed scrutiny.

This trend is reflective of a healthy democracy. It is also a trend where applicants' expectations have created more demands on resources. It has required adjustments to cultures relating to access to government information, and the collection, use, and disclosure of personal information. FOIPOP Administrators have adjusted to these changes successfully, and will continue to do so. They are trained on both processes and specific topics, and consult with the FOIPOP Coordinator for the N.S. Government on a regular basis to learn best practices. They have access to a Procedures Manual outlining best practices in detail, and they attend periodic meetings of their peers on FOIPOP Process issues throughout the year.

A statistical summary of the legislation is found in the Appendix I. While the statistical tables do not list the total requests received by each government "public body", an analysis of the data indicates that the vast majority of applications are received by a limited number of departments (i.e. Health, Environment and Labour, Community Services, Justice). As well, the majority of issues related (general information) requests in the past year have come from the media and political parties.

The costs of administering this legislation are estimated now to be close to at least \$ 1 Million per year, and the fees collected amount to about \$16,000 per year. While this estimate is comprised of both assigned as well as direct costs, (and has been the cause of some debate) it does represent a best effort to identify the resource costs of administering the legislation. It also does not reflect the staff and management time of those who are involved in the processing of specific applications, but who are not directly responsible for administering the *Act*. In this environment, the first challenge is to ensure that these large volume departments have adequate resources to maintain a high quality of customer service. Secondly, it is necessary to ensure that remaining departments receive the support and direction needed to deal with FOIPOP requests that they receive.

2. Responding to the Challenge

Resources

The approach to providing customer service under the *Act* has been revamped through new and reallocated resources. The Department of Justice now has, in addition to the government's FOIPOP Coordinator, a staff of two individuals dedicated full-time to administering the legislation. The Department of Environment and Labour has a branch dedicated solely to information access and privacy issues. This branch advise and administers FOIPOP, a routine disclosure policy, and legislated access requirements such as the Environmental Registry. The Department of Health now has an Information Access and Privacy Unit (four persons) with a mandate to develop system wide policies, standards and processes for the responsible management of information with a focus on access and privacy. As well, one individual has now been given overall responsibility for overseeing the processing of FOIPOP applications at N.S. Business Inc., the Office of Economic Development, and the Department of Transportation and Public Works. Another individual now is responsible for processing FOIPOP applications at the Executive Council Office, and the Premier's Office. Plans to consolidate *FOIPOP Act*

processing responsibilities for some other departments are also being undertaken.

Training

Training has been offered on a regular basis by the government FOIPOP Coordinator for the past six years on processing, applicability of exemptions, appeals etc. In addition there has been training on specific topics such as mediation. An estimated 1000 plus front line staff have been trained on their responsibilities, obligations, and rights in both the areas of access and privacy. Additional training for FOIPOP Administrators and other interested individuals on processing applications, negotiations and mediation with applicants, and dealing with issues under the *Act* are also planned for the coming year. However, when a FOIPOP administrator receives a FOIPOP request once every six months, or only a few a year, it is difficult to keep the lessons and best practices of training sessions current in his or her memory. It is anticipated that the strengthening of present administrative capacity in the large volume departments, and consolidated supervisory responsibilities in less active departments will remedy this situation.

There are also plans for periodic bulletins/newsletters to keep all FOIPOP Administrators current and informed on best practices and jurisprudence. The Government FOIPOP Procedures Manual is also being updated to be not only more current, but also more user friendly, by providing more specific concrete examples that will assist administrators in working effectively with the legislation. These areas include criteria to be considered in considering fee waiver requests, guidance on what constitutes “custody” or “control” of records by a public body, and situations where third parties do not, or cannot, respond to notices seeking their representations. In addition, discussions will be initiated with local educational institutions and with the University of Alberta Extension Department to encourage more access and privacy curriculum in post secondary institutions. That university has just recently established the only certificate program in Canada for access and privacy professionals, with all six of its courses to be offered on line on the Internet by this fall. Participation in this program would help to ensure that those joining the public service, as well as those already employed by the N.S. Government, will have the opportunity to gain more knowledge and experience about access to information and privacy issues.

Streamlining Needed

Even with these adjustments, there is a continued need to streamline some aspects of access to information processes. Frequently material that is sought under a Freedom of Information application ends up being disclosed in its entirety to the applicant. However, the time taken up by the administrative requirements of the *Act* in responding to the request is in many cases counter-productive to both the applicant and to the FOIPOP Administrator. The Government recognized the need to develop a mechanism to make such information more readily available without a FOIPOP application. It recently approved “*Guidelines for Routine Access*” for all N.S. Government Public Bodies. These public bodies must develop and put in place “Routine Access Policies” that will require disclosure of certain categories of records without the

necessity of filing a FOIPOP application, except in certain limited circumstances. These policies must be posted by the end of October 2003.

Finally, there is a need to modify and clarify certain provisions in the legislation not only to achieve a more effective administration of the legislation, but also to ensure that the provisions evolve to reflect the ever changing conditions under which it operates.

3. The Need for Legislative Change

The working group of FOIPOP Administrators reviewed each section of the legislation over the past several weeks and has consulted with all FOIPOP Administrators of the N.S. Government. FOIPOP Administrators have concluded that 19 sections of the legislation need no change, or that issues around these sections may be more effectively addressed through changes to the FOIPOP Procedures Manual or training. However, there are 31 sections of the legislation where suggestions for change are proposed either through the legislation or regulations. In some cases, the recommendation is that the Advisory Committee look at alternatives to address issues, while in others specific changes are recommended. The areas of the legislation where it is recommended that change be considered by the review committee fall under six headings:

C Major Issues - New Provisions

C Definitions and Scope Process

C Exemptions

C Personal Privacy

C Review Office

C Other Issues

A. Major Issues - New Provisions

FOIPOP Administrators believe that there are several issues that were either not foreseen by the drafters of the original legislation, or have come to light over time, and need to be addressed. These involve:

C annual reporting requirements

C “frivolous and vexatious” requests

C procedures and remedies for privacy complaints

C human resources matters

Annual Reporting Requirements

There is no provision at the present time requiring an annual report on the status and experience of the government with the legislation during the previous year. FOIPOP Administrators are of the view that data now gathered efficiently on the number of FOIPOP applications and their disposition should be made public annually. It would be a measure of accountability for both the government, and for those that administer the *Act*. It also, would provide a more informed basis of public debate. The following is recommended:

- #1 *The Act be amended to require the Minister of Justice to provide an annual report on the experience with the FOIPOP Act during the previous calendar year.***

“Frivolous and Vexatious” Requests

Although there has been much public debate about what constitutes a “frivolous and vexatious” FOIPOP request, and whether there actually are such applications, administrators are of the view that this is a significant issue. “Public bodies” do receive requests from individuals usually seeking their own information, that are frequent and repetitive to no apparent purpose. A recent case in the Supreme Court dealt with just such a situation where affidavit evidence on a FOIPOP appeal to the Supreme Court indicated that one individual had filed more than 50 requests for information about himself in two years. On another occasion, the N.S. Government had to seek the consolidation of more than 30 appeals by the same individual to the Supreme Court. Administrators believe that such requests consume large amounts of time and are frequently without merit. At the same time, they are of the view that the ability to reject such requests should not be determined solely by the “public body itself”. The decision to reject should be made either only in agreement with the Review Office, or subject to the Review Officer’s review. The Review Officer himself in one of his annual reports has recommended such a provision. Alberta, B.C., and Ontario have such provisions as well. The following is recommended:

- #2 *“Public bodies” have the power to reject FOIPOP applications that are “frivolous, vexatious, or repetitive” subject to agreement by, or the review of, the Review Officer.***

Privacy Complaint Process

Currently there are no provisions in the *Freedom of Information and Protection of Privacy Act* providing for remedies if there has been an inappropriate collection, use, or disclosure of an individual’s personal privacy. All other Provinces in Canada, except Newfoundland, whose legislation dealing with privacy has not yet been proclaimed, have provisions dealing with such

situations. The provision of a remedy is long overdue. The provision of a remedy through the Review Officer, or some other independent arbitrator related to the Review Office are options we believe the Committee should consider. The following is recommended:

- #3 *The Committee should consider providing the Review Officer, or some or other independent arbitrator related to the Review Office, with the authority to investigate privacy complaints and issue reports and recommendations; provision should also be made for policies and procedures for the filing and investigation of such complaints; and the right to file such a complaint should be specifically stated in the legislation.***

Human Resources Matters

There are two significant FOIPOP issues which relate to human resources matters that need to be addressed.

The first involves investigations and reports of harassment complaints in the workplace. It is understood that respondents to such complaints have the right to know the full case against them, and the conclusions of the investigation. However, the detailed statements of some or all witnesses provided in relative confidentiality to the investigator and quoted or summarized in the report can contain personal information of the witness. As well, there may be conclusions or recommendations relative to the respondent or the complainant that are related only to that individual. As a result of the recent court case French vs. Dalhousie University, there is some question as to whether these confidentiality and personal privacy protections with respect to such information may continue to be subject to exemption in the *Act*. There is some concern that witnesses may be fearful of participating in these investigations. The following is recommended:

- #4 *Exclude harassment investigation reports from the scope of the Act where the investigations are conducted in accordance with clearly identified policies; in the alternative provide an exemption for them; however, at the same time require the public body to provide a written summary of the results of the investigation to both the complainant and respondent in the investigation.***

The second issue involves employment competitions, and again has arisen as a result of the French Case. It has raised issues surrounding records created in the process of evaluating candidates for positions within the government. It is accepted and understood that unsuccessful candidates for provincial government employment competitions have the right to know generally why they were unsuccessful in the competition. However, at the same time there may be confidential information provided during the competition process by third parties. It is important in some circumstances that the identity of those sources of information, and the specific information provided, be withheld in circumstances where there are privacy or safety issues involved. The Province of Alberta has specifically addressed this in its *Act* and we believe that a

similar provision would be appropriate for Nova Scotia. However, an exclusion or exemption should not relieve a “public body” from providing summary information to an applicant in such situations. The following is recommended:

- #5** *Add a provision that exempts information used to determine eligibility for employment (e.g. interview notes and reference information) provided a summary of the performance of an individual as a candidate in the competition process is given to that individual if requested.*

B. Definitions and Scope

Suggestions in this area are designed to make the administration of the *Act* more efficient, clarify the language of the legislation, or allow for greater privacy protection of certain individuals in certain circumstances.

Public Bodies

It has been three and one-half years since amendments to the *Act* provided a “for greater certainty” list of “public bodies” published as a schedule to the *Act*. FOIPOP Administrators are in the process of reviewing this list with their respective departments, offices, or agencies to determine which if any of these no longer exist, or which new ones should be added to the schedule. As well, there has been no review in the same time period of existing or new legislation as to the list of statutory prohibitions on the disclosure of information found in Section 4A. A review is now underway on this section as well. However, in addition to this, the following is recommended:

- #6** *The Committee review the “for greater certainty” list of “public bodies” noted in Schedule to the Act created pursuant to clause 3(1)(j) and Section 3A, and the list of statutory prohibitions and restrictions on disclosure of information listed in Section 4A to determine whether additions or deletions should be made.*

Definitions

In the Definition Section (Section 3) of the *Act* there are terms that lack clarity. These include “employee” [clause 3(1)(b)], “judicial administration record” [clause 3(1)(d)], “personal information” [clause 3(1)(i)], and “third party” [clause 3(1)(m)].

The issue of the “employee” status of individuals is an important consideration when dealing with outside contractors, volunteers, interns etc. where there are obligations of the “public body” with respect to personal privacy under the *Act*. It is important that such individuals are specifically and clearly noted as being subject to the *Act*.

The current definition of “judicial administration record” is not precise, and is important when

considering which records within the scope of that term are excluded from the scope of the *Act* under subsection 4(2) and which are not.

The current definition of “personal information” in Section 3 of the *Act* does not take into consideration circumstances where information would appear to be business rather than personal information, but really involves the assets of a sole proprietorship or a “one individual” corporation (e.g. family farm or fishing boat). The crucial personal information in these situations is where the contact information (i.e. name, address, phone number) is the same as the business information.

As well, it is our view (and consistent with the above) that the “personal information” status of information concerning deceased individuals and minors should be clarified in the Definitions section of the *Act*.

We are also of the view that fax and e-mail addresses should be included in the list of those items that qualify under the definition of personal information in clause 3(1)(i).

Municipalities became subject to FOIPOP rules under Part XX of the *Municipal Government Act*, rather than under the *FOIPOP Act* this produced an anomaly whereby “public bodies” may not exchange personal information with municipalities under Section 27 of the *Act* on the same restricted basis that “public bodies” may exchange information with each other. As well, there are restrictions with respect to transfers and extensions (under Section 9 and 10) that presently preclude municipalities. To remedy this situation the definition of “public body” should be amended to include municipalities in certain circumstances.

And finally, there are circumstances, where solicitors for individuals and organizations make representations to government, that may be protected on the basis of solicitor-client privilege. However, in some circumstances there may be no formal provision in the *Act* to notify them under Section 22. It is thus important that the “third party” status of these solicitors for purposes of the notice provisions of the *Act* be clarified.

The following is recommended,

- #7 *The definition of employee should be further defined to include outside contractors and consultants, volunteers, interns, and similar outside persons who have access to records of a “public body”.*
- #8 *The definition of “judicial administration” record should be clarified.*
- #9 *The status of the information about deceased individuals and minors should be clarified if possible in the definition section of the Act to provide more clarity to Sections 20, 30, and 43.*

#10 *The definition of “personal information” in subsection 3(1) should be extended to cover an individual’s fax number and e-mail address.*

#11 *The definition of personal information should be clarified to indicate that the contact information of a business is “personal information” where the business is a sole-proprietorship or a “single-individual” company.*

#12 *The definition of “public body” should be expanded to include municipalities for purposes of Sections 9, 10, and 27 of the Act.*

Statutory Restrictions and Prohibition

As a result of amendments to the *FOIPOP Act* in 1999, certain statutory restrictions and prohibitions to the disclosure of information were recognized [Section 4A] and were listed as prevailing over the *FOIPOP Act*. As well, there is a list of records excluded from the coverage by the *Act* list in subsection 4(2). FOIPOP Administrators are, or will be, reviewing this list with departments. This review should determine if the current restrictions, prohibitions, exclusions continue to be necessary. It will also determine whether certain legitimate restrictions and prohibitions originally overlooked, or only in existence since the amendments to the *Act* were passed, need to be looked at in greater detail. It is suggested that not only should the Advisory Committee should look at any suggestions that emerge from this exercise, but also turn its own attention to the adequacy of the list. The following is recommended:

#13 *The Committee review the exclusions in Section 4(2) and the list of statutory restrictions or prohibitions to the disclosure of information that prevail over the FOIPOP Act as in subsection 4A to determine the current appropriateness of both.*

C. Access Process

FOIPOP Administrators believe that the current *Act* for the most part is clear on rights and obligations in the access process. However, there remains, some wording that either does not reflect current realities, is confusing, or not always consistent with other provisions in the *Act*. These challenges include:

Access

- No provision for alternate access for persons with disabilities;
- Lack of clarity of responsibility for identifying responsive records in clause 6(1)(b);
- No provision to allow for no confirmation of the existence of a record where personal privacy or public safety issues are involved;

Format

- Lack of clarity in the *Act* regarding obligations of the “public body” to create a record in a format requested by the applicant ; an example might be where the applicant requests a copy of a record in one electronic format, and the record was would usually be created another electronic format more frequently used by the “public body”.

Extensions

- The inability of FOIPOP Administrators to seek an extension for further consultation with another level of government; presently an extension may be claimed for further consultation with third parties, or other public bodies; consultations with other levels of government are usually not eligible for extensions, and can sometimes take an extensive period of time;
- Lack of capacity to extend the time for response to a FOIPOP request beyond 30 days where the same applicant has filed multiple requests simultaneously with a public body; currently if an applicant files five or six requests with a public body at the same time, the public body is obligated to respond within 30 days unless it meets the criteria for extension specified in Section 9;
- No specific requirement for written notification to applicants when an extension to the 30 day response time is claimed; at the moment there is only an obligation to “tell“ the applicant;

Transfers

- No linkage within the *Act* to allow transfers of FOIPOP applications to municipalities;

Fees

- Loss of flexibility to better negotiate a manageable scope for requests with FOIPOP applicants since the removal of two-free hours of time to locate and retrieve records;

Third Party Notice

- Some confusion as to when, and in what circumstances, third party individuals and businesses whose interests are affected under Sections 20 or 21 have to be notified under Section 22.

While FOIPOP administrators have dealt with these challenges effectively, legislated amendments that clarify rights and obligations, allow more flexibility, and recognize interrelationships, would lessen the challenges immeasurably. The following is recommended:

Access

- #14 *A provision should be added to allow for alternate access for persons with disabilities.*
- #15 *Change “individual” to “employee” in clause 6(1)(b) to make it clear that the responsibilities for identifying records relevant/responsive to a request rests within the public body.*
- #16 *Add to clause 7(2)(c) the ability for a public body in responding to an applicant, to neither confirm nor deny the existence of a record if issues of personal privacy or safety are involved.*

Format

- # 17 *Add a provision similar to that of the Newfoundland FOIPOP Act (as yet unproclaimed) to give a public body the ability to create a record in a format requested by the applicant, if it would be simpler or less costly to do so.*

Extensions

- # 18 *Amend clause 9(1)(c) to allow an extension for further consultation with another level of government listed in Section 12.*
- # 19 *Amend clause 9(1)(c) to allow for time extensions to be granted in situations of multiple concurrent requests from a single source, and on condition that the extension is first authorized by the Review Officer.*
- #20 *Revise subsection 9(2) to change “tell” the applicant to “notify the applicant in writing”, or in an alternate format for persons with disabilities, where an extension is granted.*

Transfers

- #21 *Revise Section 10 to allow for transfers of FOIPOP requests between public bodies and municipalities.*

Fees

- #22 *Consider restoring the two free hours for locating and retrieving records [Old subsection 11(3)] to allow more negotiating flexibility for public bodies.*

Third Party Notice

- #23 Clarify Section 22 to provide greater clarity as to circumstances when third parties, whose interests are affected under Sections 20 and 21 of the Act, must be formally notified.**

Exclusions

There are currently provisions in the *FOIPOP Act* that exclude certain types of records or entities from the scope of the *Act*. These include the records of the Ombudsman, Review Office, Legislative Counsel, and records donated to the Public Archives of N.S. We believe that this list of excluded records does not reflect in clear language the actual records that are, and should be, subject to the *Act*.

The *Act* makes no mention of records in Caucus Offices, constituency offices, the Office of the Speaker of the House of Assembly, and those records of the House of Assembly itself. As well, there is no comparable exclusion for records donated to archives of public bodies generally (e.g. municipalities or universities). Other Provinces such as Alberta and Manitoba have exclusions that deal with legislative records, constituency offices, or archival donations. No Province has extended the exclusion to caucus offices. Exclusion of such records would be in keeping with current interpretation of the Act, or in the case of the Archives, make the provision more consistent for all “public body” archives. The following is recommended:

- #24 Add the records of caucus offices, constituency offices, the Office of the Speaker of the House of Assembly, and the House of Assembly to the list of excluded entities under subsection 4(2)(3). Also, add an exclusion for records donated to archives of local public bodies, the N.S. Community College, and municipalities.**

D. Exemptions

For the most part, the exemptions under the *Act* are in some cases less broad in scope than those of other jurisdictions. However, FOIPOP Administrators believe that the exemptions generally are clear and comprehensible. In particular, administrators are encouraged with the clarity that has emerged from the O’Connor and Fuller FOIPOP Court Appeals over the last year regarding the important exemption for cabinet confidentiality. However, there are modifications to three exemptions that need to be addressed. There should be a slight wording change in Section 12 to be more consistent with Section 13 or 14. There is a need for clarity on the applicability of the solicitor-client exemption relative to records of third party solicitors in the custody or under the control of public bodies. There is also a need to remove a burden of proof where there is potential use of name, address, or phone number for mailing or solicitor purposes.

Intergovernmental Relations

Sections 13 and 14 exempt information that “would reveal” the “substance of deliberations of the executive council” and “advice” respectively. Section 12 now permits information to be exempt “if disclosure could reasonably be expected to harm the conduct by the Government of Nova Scotia of relations” with another level of government.

Solicitor Client Privilege

The records of outside solicitors communicating with government may or may not be subject to exemptions under Sections 16, 20 or 21. As well, records exchanged between solicitors on a confidential basis during a litigation process or negotiation are not specifically covered under the Act.

Privacy

In the list of presumptions of unreasonable invasions of privacy in subsection 20(3), it is noted that it is presumed to be an unreasonable invasion of an individual’s privacy to disclose the” name together with the third party’s address, or phone number” if the information is “to be used for mailing lists or solicitations by telephone or other means”. We believe that there should be no need to provide evidence of the use of the information to have presumption of an unreasonable invasion of an individual’s privacy. While one might assume such use based on an objective view, it could be difficult to prove such use in practice. The following is recommended to address these issues:

Intergovernmental Relations

- #25 Revise the wording in Section 12 to reflect information exempted if it would reveal information provided in confidence from another government as opposed to the current “reasonably expected to reveal information”***

Solicitor Client Privilege

- #26 Clarify the status of third party solicitor records in possession of a public body, and clarify circumstances relative to the waiver of solicitor-client privilege where information is otherwise confidential in a litigation or negotiation context between the parties.***

Privacy

- #27 In clause 20(3)(i) remove “.....and is to be used for mailing lists or solicitation purposes”.***

E. Personal Privacy Protection

As a result of extensive training, not only with FOIPOP Administrators and front line staff, there is greater awareness now within “public bodies” about the privacy rights of individuals with respect to the personal information held by government, and their obligations to protect that information from inappropriate use and disclosure. For the most part “public bodies” are aware of their obligations, and frequently seek the advice of the FOIPOP Coordinator as to the best policies and practices. However, a few of the provisions in the *Act* are not: totally consistent with those now existing in other jurisdictions; completely clear on the limits of the provisions; do not accommodate the emerging problems in society in situations of potential domestic violence or youth at risk; or are not clear that professional and other opinions will remain in files with notations of any contrary views when a correction of personal information is requested. The changes recommended in this area are designed to address these situations. The following is recommended:

Collection of Personal Information

- #28 Revise Section 24 of the Act to reflect the “collection” principle of informed consent; informed consent should be required for further use except in certain circumstances (e.g. law enforcement). This provision would bring Nova Scotia more in line with privacy legislation in other jurisdictions as well as with the Federal Personal Information & Electronic Documents Act”.***

Correction of Personal Information

- #29 Remove the ambiguity as to a response time for requests to correct personal information by making it consistent with the access process (i.e. 30 days). At the moment there is no required response time.***
- #30 Amend Section 25 (Right of Correction of Personal Information) to specifically exclude the right of correction of personal or professional opinions, but require any contrary opinion to be placed on the file;***

Use and Disclosure of Personal Information

- #31 Extend Sections 26 and 27 to specify that any use or disclosure of personal information permitted by the Act be restricted to only that information that one would reasonably conclude is necessary for the public body to carry out the purpose of the use, or disclosure in a responsible manner.***

F. Review Office

FOIPOP Administrators respect all aspects of the Review Process where an applicant has

requested a review on a “public body’s” disclosure decision, fee estimate, or other decision related to his or her FOIPOP request. While the Reports and Recommendations of the Review Officer are not “orders” requiring actions that must be taken by the “public body”, they are given serious consideration, thoroughly reviewed, and in many, if not most, cases, accepted either in whole or in part. They are also viewed as guidance as to the Review Officers views on certain situations whenever similar disclosure issues arise.

Review Process

The Review Process has been informal to a large degree. In many respects that is its greatest strength in allowing applicants and public bodies full opportunity to provide their views. However, we believe that the need to formalize that process, now already undertaken to some degree by the Review Officer, should be specifically recognized in the legislation in some areas. For example, in many cases, mediation permitted under Section 37 of the *Act* has resulted in a resolution of disputes on access, fees, or other issues without a lengthy review process. It is our view that “public bodies”, applicants, and where appropriate, third parties, should be required to participate in such processes. There is some anecdotal evidence that this may not occur in all cases. Also, the period in which an applicant may request a Review of a “public body” decision is 60 days, but this limit may be waived by the Review Officer if requests are made after that period. Finally, under subsection 32(3) of the *Act* the Review Officer has discretion to make decisions on whether representations in the Review Process may be oral or written, or whether a person is entitled to be present during a review, or to have access to representations made during the Review Process. The Review Officer now publishes procedural requirements but the provision in the *Act* to do so is discretionary.

FOIPOP Administrators believe that there are some elements of the review process affecting applicants that need to be more specifically prescribed by the legislation to bring a clearer context and more administrative balance to the process. The following is recommended:

- #32 *Limit the time period during which an applicant may request a review to 60 days with the possibility of an extension to 90 days by the Review Officer.*
- #33 *Amend the provision with respect to mediation to make participation in the mediation process mandatory for both an applicant and the public body.*
- #34 *Specify the authority for the Review Officer to provide policies and procedures regarding the Review Process, and require such policies to be published.*
- #35 *Amend Section 39 of the Act to specify the authority of the Review Officer to make recommendations on whether claims for exemption have been met, discretion has appropriately exercised (e.g. disclosure or fee waive decision) or other related matters.*

#36 *Amend Section 40 to provide for those situations where the Review Officer does not issue recommendations.*

G. Other Issues

1. Exercise of Right or power – Section 43

Deceased Individuals and Minors

The *Act* provides in Section 43 for an individual to exercise the rights of another individual in certain circumstances. While, on the surface this provision would appear to be useful in circumstances where an individual does not have the mental capacity, is deceased, or is a minor, in practice it has presented challenges. This occurs particularly in circumstances dealing with the records of deceased individuals and minors. At the moment, representatives of the deceased individual can only act in matters solely concerned with the administration of a deceased individual's estate. Sometimes, family members seek information about a deceased relative (e.g. father, mother, son, daughter) in other circumstances.

As well, a parent who has legal custody of a child may exercise the rights of the minor where it would not be an unreasonable invasion of privacy, but what is an “unreasonable invasion” of privacy is not specifically defined in such circumstances. On occasions there are issues with non-custodial parents seeking information about the minor (e.g. school performance, or counseling at school). In short, there are a number of circumstances that arise that do not fit the parameters of Section 43, and these situations should, if possible be addressed through changes to the *Act*. It is an issue touched upon in part in recommendations with respect to the definition of personal information in Section 3, but it also needs to be addressed in Section 43. The following is recommended:

#37 *Consider expanding clause 43(a) to include “next of kin” in certain circumstances and to other situations beyond the administration of the individual’s estate; clarify the status of “minors” under clause 43(d) in various situations (e.g. school records and non custodial parents, medical/psychological clinical records and reports, and psychometric tests).*

2. Delegation of Powers - Section 44

Designation of Administrators

The ability to delegate powers under the *Act* under Section 44 is discretionary. This means that in theory the Minister or Deputy Minister exercises all the powers of the “head” of a “public body” under the *Act*. In reality, FOIPOP Administrators perform the day to day work under the *Act*, and should have specific delegation. If delegation does not occur, then the authority of administrators to act in various circumstances is open to challenge, and responsibilities are not

clearly defined. Delegation should not only be a power of the head, but a mandatory requirement under the *Act* to ensure that administration and decision making authority is clearly defined. The following is recommended:

#38 *Amend the Act to provide a requirement to designate an administrator and to clearly delegate in writing his or her authority and responsibilities.*

3. Limitation of Liability and Offenses - Sections 46 and 47

Disclosure Liability and Malicious Use Offences

The provisions dealing with civil and criminal liability for those acting under the *FOIPOP Act* do not presently cover all appropriate situations in which those with responsibilities deal on a daily basis.

The *Act* fails to provide in Section 46 the same protection from liability for “failing to disclose” information “in good faith” as there is for disclosing information “in good faith”. The liability for any failure to disclose information is not immediately clear. Administrators believe that if they act “in good faith” as delegated “heads” of a public body, there should be no liability for failure to disclose, as well as for disclosing information.

Administrators also believe that the offence provisions in Section 47 should not be limited to malicious “collection” and “disclosure” of personal information, but also should apply to malicious “use” of information. Such an amendment would make the provisions more consistent internally, and with the overall purpose and intent of the *Act*. The following is recommended:

#39 *Add in Clause 46(1)(a) a provision for no liability for “failure to disclose” if the individual acted “in good faith”.*

#40 *Add “uses” to “collects or discloses” in subsection 47(1).*

4. Directory Respecting Records of Public Bodies – Section 48

Mandatory Directory

Section 48 of the *Act* currently requires the Minister of Justice to “publish a directory to assist in identifying and locating records of public bodies”. The provision, however, only applies to public bodies “prescribed by the regulations”. Although no “public bodies” have been listed in the regulations, the N.S. Government (through the Department of Justice and Nova Scotia Records Management) published a hard copy directory encompassing all public bodies. Later a revised electronic version was available through the government web site.

Feedback suggested that the directory was not extensively used by those outside government in the initial years under the legislation. More recently there have been requests for information on government record holdings. There have also been administrative policy changes to now require record holding schedules to be developed by government departments. To be consistent with the emerging practices, “public bodies” should be listed as they revise their record holdings, or the *Act* should require all provincial government public bodies to comply with section 48. The following is recommended:

#41 *The requirement in Section 48 for the Minister of Justice to “publish a directory to assist in identifying and locating records of public bodies” should be specific as to what public bodies the provision applies, or the regulations should be altered to list “public bodies” which have been prescribed.*

5. Regulations - Section 49

Definition Authority

While clause 49(1)(o) allows the Governor in Council to define “any word or expression used but not defined in this *Act*”, we believe the authority to make any significant change to some definitions should be clearly specified in the *Act*. For example, if the definition of “personal information” is changed by regulation rather than by legislative amendment (Recommendation # 10), then the authority to do so should be specifically spelled out in the legislation. The following is recommended:

#42 *Add a specific provision that provides in Section 49 for defining or determining what is “personal information” by regulation.*

6. Review of the *Act* – Section 50

The initial legislation required that a review of the legislation be initiated within three years after it came into force. This was done, and a report of the Committee responsible for reviewing the *Act* was issued in March 1996. Amendments to the *Act* in 1999 required a second review committee to be established before the end of 2002, and the mandate of the current committee is pursuant to that legislative requirement. Although the *Act* should be periodically reviewed, we believe it should be done after a longer period of further experience with the legislation. The following is recommended:

#43 *A review of the legislation be undertaken within five years following the passage of any additional amendments to the *Act*.*

4. Summary and Conclusion

FOIPOP Administrators administer the *Freedom of Information and Protection of Privacy Act* with integrity and dedication. Their roles have evolved from part-time to a point where a significant part of their positions involve administration of the *Act*. The approach in Nova Scotia, although far from perfect, has served both taxpayers, and the government well. However, the evolution of the FOIPOP process suggests that changes to the approach are necessary administratively and there should be amendments to the legislation as well. Administrative improvements have already been implemented, are underway, or are in the planning stages. Consideration of legislative change to clarify provisions, recognition of legitimate confidentiality concerns in certain areas such as personal privacy, and provision of more formal authority in the legislation for the Review Office, are also recommended.

Again, we thank you for the opportunity to raise issues and suggest changes responding to those issues. If the issues raised in this submission are reviewed and given serious consideration by the Advisory Committee, our work will have achieved its objective.

Appendix I

Summary of Recommendations

FOIPOP Administrators Working Group

Government Submission to the *FOIPOP Act* Advisory Committee

Summary of Recommendations

June 27, 2003

- #1 *The Act be amended to require the Minister of Justice to provide an annual report on the experience with the FOIPOP Act during the previous calendar year.*
- #2 *“Public bodies” have the power to reject FOIPOP applications that are “frivolous, vexatious, or repetitive” subject to agreement by, or the review of, the Review Officer.*
- #3 *The Committee should consider providing the Review Officer, or some or other independent arbitrator related to the Review Office, with the authority to investigate privacy complaints and issue reports and recommendations; provision should also be made for policies and procedures for the filing and investigation of such complaints; and the right to file such a complaint should be specifically stated in the legislation.*
- #4 *Exclude harassment investigation reports from the scope of the Act where the investigations are conducted in accordance with clearly identified policies; in the alternative provide an exemption for them; however, at the same time require the public body to provide a written summary of the results of the investigation to both the complainant and respondent in the investigation.*
- #5 *Add a provision that exempts information used to determine eligibility for employment (e.g. interview notes and reference information) provided a summary of the performance of an individual as a candidate in the competition process is given to that individual if requested.*
- #6 *The Committee review the “for greater certainty” list of “public bodies” noted in Schedule to the Act created pursuant to clause 3(1)(j) and Section 3A, and the list of statutory prohibitions and restrictions on disclosure of information listed in Section 4A to determine whether additions or deletions should be made.*
- #7 *The definition of employee should be further defined to include outside contractors and consultants, volunteers, and interns who have access to records of a “public body”.*
- #8 *The definition of “judicial administration” record should be clarified.*

- #9 *The status of the information about deceased individuals and minors should be clarified if possible in the definition section of the Act to provide more clarity to Sections 20, 30, and 43.*
- #10 *The definition of “personal information” in subsection 3(1) should be extended to cover an individual’s fax number and e-mail address.*
- #11 *The definition of personal information should be clarified to indicate that the contact information of a business is “personal information” where the business is a sole-proprietorship or a “single-individual” company.*
- #12 *The definition of “public body” should be expanded to include municipalities for purposes of Section 9, 10, and 27 of the Act.*
- #13 *The Committee review the exclusions in subsection 4(2) and the list of statutory restrictions or prohibitions to the disclosure of information that prevail over the FOIPOP Act as in Section 4A to determine the current appropriateness of both.*
- #14 *A provision should be added to allow for alternate access for persons with disabilities.*
- #15 *Change “individual” to “employee” in clause 6(1)(b) to make it clear that the responsibilities for identifying records responsive to a request rests within the public body.*
- #16 *Add to clause 7(2)(c) the ability for a public body in responding to an applicant, to neither confirm nor deny the existence of a record if issues of personal privacy or safety are involved.*
- #17 *Add a provision similar to that of the Newfoundland FOIPOP Act (as yet unproclaimed) to give a public body the ability to create a record in a format requested by the applicant, if it would be simpler or less costly to do so.*
- #18 *Amend clause 9(1)(c) to allow an extension for further consultation with another level of government listed in Section 12.*
- #19 *Amend clause 9(1)(c) to allow for time extensions to be granted in situations of multiple concurrent requests from a single source, and on condition that the extension is first authorized by the Review Office.*
- #20 *Revise subsection 9(2) to change “tell” the applicant to “notify the applicant in writing”, or in an alternate format for persons with disabilities, where an extension is granted.*

- #21 *Revise Section 10 to allow for transfers of FOIPOP requests between public bodies and municipalities.*
- #22 *Consider restoring the two free hours for locating and retrieving records [Old subsection 11(3)] to allow more negotiating flexibility for public bodies.*
- #23 *Clarify Section 22 to provide greater clarity as to circumstances when third parties, whose interests are affected under Sections 20 and 21 of the Act, must be formally notified.*
- #24 *Add the records of caucus offices, the Office of the Speaker of the House of Assembly, and the House of Assembly to the list of excluded entities under subsection 4(2)(3). Also, add an exclusion for records donated to archives of local public bodies, the N.S. Community College, and municipalities.*
- #25 *Revise the wording in Section 12 to reflect information exempted if it would reveal information provided in confidence from another government as opposed to the current “reasonably expected to reveal information”*
- #26 *Clarify the status of third party solicitor records in possession of a public body, and clarify circumstances relative to the waiver of solicitor-client privilege where information is otherwise confidential in a litigation or negotiation context between the parties.*
- #27 *In clause 20(3)(i) remove “.....and is to be used for mailing lists or solicitation purposes”.*
- #28 *Revise Section 24 of the Act to reflect the “collection” principle of informed consent; informed consent should be required for further use except in certain circumstances (e.g. law enforcement). This provision would bring Nova Scotia more in line with privacy legislation in other jurisdictions as well as with the Federal Personal Information & Electronic Documents Act”.*
- #29 *Remove the ambiguity as to a response time for requests to correct personal information by making it consistent with the access process (i.e. 30 days). At the moment there is no required response time.*
- #30 *Amend Section 25 (Right of Correction of Personal Information) to specifically exclude the right of correction of personal or professional opinions, but require any contrary opinion to be placed on the file;*
- #31 *Extend Sections 26 and 27 to specify that any use or disclosure of personal information permitted by the Act be restricted to only that information that one would reasonably*

- conclude is necessary for the public body to carry out the purpose of the use, or disclosure in a responsible manner.*
- #32 *Limit the time period during which an applicant may request a review to 60 days with the possibility of an extension to 90 days by the Review Officer.*
- #33 *Amend the provision with respect to mediation to make participation in the mediation process mandatory for both an applicant and the public body.*
- #34 *Specify the authority for the Review Officer to provide policies and procedures regarding the Review Process, and require such policies to be published.*
- #35 *Amend Section 39 of the Act to specify the authority of the Review Officer to make recommendations on whether claims for exemption have been met, discretion has appropriately exercised (e.g. disclosure or fee waive decision) or other related matters.*
- #36 *Amend Section 40 to provide for those situations where the Review Officer does not issue recommendations.*
- #37 *Consider expanding clause 43(a) to include “next of kin” in certain circumstances and to other situations beyond the administration of the individual’s estate; clarify the status of “minors” under clause 43(d) in various situations (e.g. school records and non custodial parents, medical/psychological clinical records and reports, and psychometric tests).*
- #38 *Amend the Act to provide a requirement to designate an administrator and to clearly delegate in writing his or her authority and responsibilities.*
- #39 *Add in Clause 46(1)(a) a provision for no liability for “failure to disclose” if the individual acted “in good faith”.*
- #40 *Add “uses” to “collects or discloses” in subsection 47(1).*
- #41 *The requirement in Section 48 for the Minister of Justice to “publish a directory to assist in identifying and locating records of public bodies” should be specific as to what public bodies the provision applies, or the regulations should be altered to list “public bodies” which have been prescribed.*
- #42 *Add a specific provision that provides in Section 49 for defining or determining what is “personal information” by regulation.*
- #43 *A review of the legislation be undertaken within five years following the passage of any additional amendments to the Act.*

Appendix II
FOIPOP Statistics

Estimated Costs of Administering the FOIPOP Act

*N.S. Department of Justice	\$169,000
*N.S. Department of Environment & Labour	\$110,000
Health	\$ 71,000
*Other Departments	\$390,000
Total Government Departments	\$740,000
**Review Office	\$212,000
Total Costs	\$952,000

***The N.S. Department of Justice had an identified FOIPOP Budget for the 2002-2003 fiscal year. The Departments of Environment and Labour and Health each had an identified budget area from which FOIPOP costs can be roughly estimated total. For all other departments, costs were determined through a survey of FOIPOP Administrators and their staff on the percentage of time currently spent on FOIPOP work(i.e. winter of 2003) . It does not include an allocation of staff and senior management time that may have been spent in locating, retrieving, preparing, producing, consulting on, or making disclosure decisions on records. The resulting percentage was multiplied by the salary data in the 2001-2002 Supplement to the Public Accounts for the 2001-2002 Fiscal Year . Costs for the Review Office are derived from the 2002 Annual Report of the Review Officer.**

1994 -2002 FOIPOP Fees Collected

YEAR	Record of Fees Collected
1994	\$3,188.61
1995 ¹	\$2,817.13
1996	\$2,871.40
1997	\$3,191.12
1998	\$3,231.43
1999	\$7,899.21
2000	\$9,172.21
2001	\$5,584.60
2002 ²	\$15,931.10
TOTAL FEES	\$53,886.81

¹Fee information was not collected during the first quarter of 1995

²The 2002 statistics reflect a revision made to the original total of \$14,998.60 made public recently the revision was made after further input from government departments.

Nova Scotia FOIPOP Applications - Decisions

Period	# Received	# Completed	Granted in Full		Partially or Mostly Granted		Denied		Other ³	
1994	161	124	76		36		12		-	
1995	323	266	160		74		32		-	
1996	485 ⁴	396	281		67		48		-	
1997	539	469	225		132		83		29	
1998	591	492	203		163		91		35	
1999	594	540	271		162		65		42	
2000	820	643	225		248		90		80	
2001	1072	779	272		282		69		156	
2002	995	870	245		406		54		165	
TOTAL	5,580	4579	1958	42.76%	1570	34.29%	544	11.88%	507	11.07%

³Includes publicly available documents that did not have to be provided, as well as where no records existed, or the record was not “in the custody or under the control” of the public body. This additional category was not tracked from 1994-1996. It presumably appeared under the “Denied” category until 1997.

⁴This does not include approximately 35 applications that were received by various “public bodies”, but transferred to another department to respond to the request for records.

N.S. FOIPOP Applications - Response Times

Year	Apps. Completed	30 Days	% 30 Days	% 31 to 60 Days	31 to 60 Days	61+ Days	% 61+ Days
1997	469	318	67.80%	113	24.09%	38	8.10%
1998	492	338	68.70%	125	25.41%	29	5.89%
1999	540	324	60.00%	153	28.33%	63	11.67%
2000	643	398	61.90%	164	25.51%	81	12.60%
2001	788	501	63.58%	216	27.41%	71	9.01%
2002	870	506	58.16%	231	26.55%	133	15.29%
Total	3802	2385	62.73%	1002	26.35%	415	10.92%

FOIPOP Applications - By Source

1997	# of Requests	Media		Political Party		Public		Other	
Jan.- March	117	17	15%	26	22%	73	62%	1	1%
Apr - Jun	101	12	12%	9	9%	77	76%	3	3%
Jul-Sep	105	10	10%	11	10%	81	77%	3	3%
Oct-Dec	216	82	38%	37	17%	97	45%	0	0%
Total	539	121	22.4%	83	15.4 %	328	60.9 %	7	1.2%

1998	# of Requests	Media		Political Party		Public		Other (*Businesses)	
Jan.- March	129	68	53%	9	7%	36	28%	16	12%
Apr - Jun	124	46	37%	11	9%	55	44%	12	10%
Jul-Sep	142	39	27%	22	15%	58	41%	23	16%
Oct-Dec	196	45	23%	38	19%	102	53%	11	6%
Total	591	198	34%	80	14%	251	42%	62	10%

2001	# of Requests	Company / Business		Media		Other		Political Party		Private Individual		Public Interest	
Jan.- March	281	16	16.37 %	46	16.37 %	15	5.34 %	75	26.69 %	105	37.37 %	24	8.54 %
Apr - Jun	234	26	11.11 %	24	10.26 %	11	4.70 %	26	11.11 %	115	49.15 %	32	13.68 %
Jul-Sep	257	19	7.39 %	31	12.06 %	12	4.67 %	62	24.12 %	123	47.86 %	10	3.89 %
Oct-Dec	300	34	11.33 %	24	8.00 %	22	7.33 %	82	27.33 %	128	42.67 %	10	3.33 %
Total	1072	95	8.86 %	125	11.66 %	60	5.60 %	245	22.85 %	471	43.94 %	76	7.09 %

2002	# of Requests	Academia		Company / Business		Media		Other		Political Party		Private Individual		Public Interest	
Jan.-March	364	1	0.27 %	14	3.85 %	56	15.38 %	11	3.02 %	137	37.64 %	133	36.54 %	12	3.30 %
Apr - Jun	231	6	2.60 %	18	7.79 %	17	7.36 %	12	5.19 %	52	22.51 %	120	51.95 %	6	2.60 %
Jul-Sep	235	0	0.00 %	19	8.09 %	13	5.53 %	5	2.13 %	43	18.30 %	152	64.68 %	3	1.28 %
Oct-Dec	165	1	0.61 %	9	5.45 %	19	11.52 %	8	4.85 %	44	26.67 %	78	47.27 %	6	3.64 %
Total	995	8	0.80 %	60	6.03 %	105	10.55 %	36	3.62 %	276	27.74 %	483	48.54 %	27	2.71 %

Note: If General Information Requests only are considered for the 2002 calendar year, then the source of applications is as follows: Total General Applications = 640; Academia 6 (0.9%); Company or business 56 (8.8%); Media 103 (16.1%); Political Party 257 (40.2%); Private Individual 170 (26.6%); Public Interest Group 24 (3.8%); and Other 24 (3.8%).