Kenzie MacKinnon

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Peter O'Brien, Chair
Freedom of Information and Protection of Privacy Act
Review Committee
c/o Nova Scotia Department of Justice
5151 Terminal Road
P.O. Box 7
Halifax NS B3J 2L6
(Email: foiadvcm@gov.ns.ca)

Dear Mr. O'Brien:

Re: *Freedom of Information and Protection of Privacy Act*

Please accept this as the written submission of the Bloomfield Neighbourhood Residents Association to the advisory committee you chair. We understand that your committee is carrying out a comprehensive review of the workings of the current Nova Scotia *Freedom of Information and Protection of Privacy* ("FOIPOP") *Act*. The Bloomfield Neighbourhood Residents Association is an active community group in the Bloomfield area of northend Halifax. Much of our efforts over the past several years has been directed at encouraging compliance in our area with municipal housing standards by-laws. For several years now, members of our association have been frustrated by our difficulties in convincing municipal staff to pursue enforcement against property owners who are clearly in violation of the by-laws.

Recently, we have been encouraged by the apparent improvements which have been made to the property standards enforcement regime. First, it would appear that the new by-law passed by HRM earlier this year is a more efficient and effective tool in pursuing compliance. It had been our impression that the previous by-law was very difficult to use against a property owner determined not to address obvious breaches. Secondly, we were encouraged by the appointment of Tanya Phillips as Chief By-Law Enforcement Officer. In our dealings with Ms. Phillips, she was cooperative and knowledgeable about our concerns and her department's efforts to address those concerns. Nonetheless, a serious problem has arisen which is impeding the new by-law being effectively implemented.

In response to an invitation from the Bloomfield Neighbourhood Residents Association, Ms. Phillips attended our May monthly meeting. She described the relevant provisions of the new by-law and her department's intentions to implement them. However, when we asked Ms. Phillips about the particular properties about which we have had long-standing concerns, she insisted that she had been instructed by the HRM's legal counsel that she could not provide us with any information on her department's efforts to implement the by-law in any particular situation. In other words, it is the HRM's position that, once a citizen or community group

complains to the by-law enforcement department about a breach or breaches of the by-law, departmental staff are prohibited by the FOIPOP Act, or its equivalent Part XX of the *Municipal Government Act,* from ever discussing with the complainant what steps are being taken to remedy the apparent breach. The complainant is supposed to accept in good faith that the department is acting in response to the complaint and that, at some point down the road, the breach will be appropriately addressed in some unknown way.

Obviously, this is an unacceptable outcome. The municipality's citizens have a right to lay a complaint alleging that a municipal by-law is being breached. That citizen then should have the right to be kept informed by municipal staff of their efforts to correct that breach. It is not acceptable for municipal staff to claim that they are satisfying their obligations to citizens simply by offering them general assurances that compliance is being pursued. That is a misunderstanding of the appropriate citizen/government relationship.

Furthermore, it is our position that this approach is not supported by the actual provisions of the *Freedom of Information and Protection of Privacy Act*. In other words, municipal legal counsel were incorrect when they informed Ms. Phillips that she would have been in breach of the Act if she had have answered our questions about the status of her department's efforts to ensure compliance with the new by-law. I am attaching copies of an exchange of correspondence between Wayne Anstey, Director, Legal Services for the Halifax Regional Municipality, and me concerning our request of Ms. Phillips. It is our position that Mr. Anstey is wrong in his interpretation of the sections of the *Municipal Government Act* to which he refers (which sections directly correspond to sections of the FOIPOP Act).

First, subsection 4(1) of the FOIPOP Act (which corresponds with subsection 463(1) of the *Municipal Government Act*) clarifies that the Act "applies to all records in the custody or under the control of a public body". Subsection 3(k) of the Act defines record as including "books, documents, maps, drawings, photographs, letters, vouchers, papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records". The FOIPOP Act therefore is about the release or retention of a "thing on which information is recorded", not about the authority of an official of a public body to answer a question about the activities of her department.

We are not taking this section out of the general context of the Act. Section 2 of the Act clarifies that it has three purposes: (a) to ensure that public bodies are fully accountable to the public, (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, and (c) to protect the privacy of individuals with respect to personal information about themselves held by public bodies. We were pursuing the first of these purposes, to hold Ms. Phillips and her department accountable to the residents of our neighbourhood, when we asked the questions which she has been instructed to refuse to answer.

The result of these instructions is to use the Act to reduce the public accountability of HRM, not to ensure it.

The second purpose of the FOIPOP Act is no better served by the instructions which Ms. Phillips received. In particular, Mr. Anstey's response to my inquiry applied unnecessary exemptions in a general, unspecific way to ensure that government information was kept from citizens.

Thirdly, the protection of privacy section of the FOIPOP Act is directed solely at protecting "personal information", as defined in subsection 3(1) of the Act. It is clear from reading the Act that, if the Bloomfield Neighbourhood Residents' Association were seeking personal information about the property owners allegedly in violation of the by-law, Ms. Phillips and members of her staff should not provide this information. However, no possible interpretation of the *Act*'s definition of personal information could apply to Ms. Phillips informing the Association about the steps which her department has taken to respond to the complaints which we have made. We are not seeking personal information and there is no reason for personal information to be provided in the course of answering our questions about the status of the implementation efforts.

Reliance on the FOIPOP Act to block disclosure is a legal red-herring, which unfortunately has been used to impede citizens' rights to know what their municipality's staff is doing to implement municipal by-laws. Are there changes to the FOIPOP Act which could prevent it being used as a shield by government officials to block disclosure, rather than as a sword by citizens to fulfill its explicit purposes? We believe that two amendments to the Act would assist in preventing misuse of the Act in the future. First, Mr. Anstey's response may partly arise from inconsistent use of the terms "record" and "information" in the Act. The first two parts of the Act refer clearly to "access to records". However, the next part of the Act, dealing with exemptions, uses the term "information" instead. Although this term is not defined in the Act, its use could lead government officials to claim that the Act deals with more than just records, despite the wording of subsection 4(1) of the Act. Our Association therefore recommends that either the term "information" be replaced in the Act by the word "record", or that the term "information" be explicitly defined similarly to "record".

Our second recommendation is more complex. In the summer of 1976, while I was a student at Dalhousie Law School, I worked at the Centre for Study of Responsive Law in Washington, D.C., Ralph Nader's principal legal research centre. At the end of my summer of research, I prepared a paper entitled *Canadian Applications on Access to Information*, a copy of which I am attaching. Mr. Nader presented this paper to the 1976 meeting of the Canadian Bar Association, which accepted his recommendations and passed a resolution calling for an access to information act in Canada, which resolution was accepted by the Federal Government several years later.

My research principally consisted of studying first-hand the workings of the American *Freedom of Information Act*, especially the reforms to it of 1974. The paper set out six particular characteristics of the American Act which were required for it to succeed in carrying out its

expressed purposes. The absence of one or more of these characteristics had caused the pre-1974 version of the Act to fail.

The fourth required characteristic is set out at page 21 of the attached paper and is the one which is most clearly missing from the present Nova Scotia FOIPOP Act: "All denials of requests should include the name of the civil servant who made the decision to deny the request. If the civil servant is found by the arbiter of an appeal to have acted arbitrarily or capriciously in denying the request, he or she should be subject to disciplinary action." The next four pages of the report set out arguments which support the conclusion that our FOIPOP Act will only truly work if it includes a provision for such disciplinary action.

Our current Act could not be any more committed in principle to full disclosure. It recognizes the public's right of access to its government's records. It recognizes that any exemptions to this principle are to be limited and specific. It clarifies that the Act is not be used to restrict access to information which had been provided by custom or practice prior to the Act's introduction. Nonetheless, despite these strong words, civil servants empowered to give out records will always find it easier to use the Act to avoid disclosure, unless there is an explicit sanction to prevent that happening. That was the American experience in the early 1970's, and Mr. Anstey's letter could not be a better example of the tendency to subvert the purpose of the Act. There has to be a strong incentive embedded in the Act to push civil servants to overcome the tendency to be overly cautious and risk adverse when faced with citizens seeking information on the workings of their government.

For the Bloomfield Neighbourhood Residents Association, the FOIPOP Act has been used as a tool to impede the disclosure of information. There is nothing about our experience which would suggest that it was unusual or uncommon. Surely, the purpose of your review committee is to identify amendments to the Act which would induce the fulfillment of its purposes. We trust that we have made the case that the two amendments we have suggested would assist in doing so.

Yours truly,

BLOOMFIELD NEIGHBOURHOOD
RESIDENTS ASSOCIATION

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