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August 29, 2003

Mr. Peter O'Brien
Chair
Freedom of Information and
Protection of Privacy Act
Advisory Committee
PO Box 7
4th Floor, 5151 Terminal Rd.
Halifax, NS B3J 2L6

Dear Mr. O'Brien:

Re: Submission of FOIPOP Administrators

Thank you for your letters of July 24 and August 7, 2003. We are pleased to have the opportunity to provide further clarifications with respect to 10 of the 43 recommendations made in the brief submitted by myself on behalf of FOIPOP Administrators of the N.S. Government.

We have addressed the recommendations in numerical order and attempted to provide further details with respect to the issues involved and the rationale for making the recommendation.

Recommendations #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.

This recommendation deals with the lists mentioned in three sections of the *Act*: cl. 3(1)(j), s.3A and s. 4A. Government departments have been reviewing these lists to ensure their currency and completeness, but at the time of filing the submission the process was not complete. Our initial review has indicated that some ABC's have ceased to exist, while new ABC's have been created and that there are some conflicts or potential conflicts which have not been addressed. In light of the Committee's mandate which includes a determination as to whether new “public bodies” were needed, we believe it would be useful if the Committee also reviewed the three lists for adequacy and currency.

Recommendation #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”.

The reason for expanding the definition of employee is to cover persons who, although not civil servants, may in the course of their work for government have and/or need access to personal information in government records. The nature of government operations has changed to allow for more outsourcing, for example, in the IT area. The mandate of some of these people may not be covered under the existing privacy provisions of the *Act* - ie: employment contracts; research contracts. The inclusion of the following types of persons in the definition of employee would allow for clarification of roles and responsibilities of such persons under the *Act*: (1) volunteers to private-public/stewardship/community-based committees or projects; (2) interns and students; (3) contractors or consultants who may be on a service contract, which may be project specific, or who are brought in ad hoc to provide a service.

Recommendation #8: The definition of “judicial administration” record should be clarified.

“Judicial Administration” records are defined in clause 3(1)(d) and are excluded from the *FOIPOP Act* under clause 4(2)(c). Court administration records are specifically identified as being subject to the *FOIPOP Act* in clause 4(1). However, in the past there has been some question as to the relationship between these two sections, i.e. to what records does the *Act* apply or not apply. For example, financial expenditures relating to the facilities in which judges are specifically housed - should they be considered judicial administration or court administration information?

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

The purpose of the recommendation, (adding fax number and email address to the definition of personal information), is to expand the definition to new technologies and to recognize that an individual's contact information is personal information. Manitoba's *FOI Act* includes fax and email in the definition of personal information.

Recommendation #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.

This recommendation is similar to Recommendation # 6. This list is being reviewed for currency as well. The review is not yet complete. The recommendation merely suggests that the Advisory Committee conduct the same exercise from its own perspective.

Recommendation #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.

Occasionally, solicitors representing third party businesses or individual clients will make legal representations or provide written opinions as part of a request for business assistance, discussions on legislative issues, or as part of negotiations in a litigation, commercial, or property matter. The correspondence or material provided to the government might not be considered business confidential information that is required to be withheld under the exemption provisions of Section 21 of the *Act*. It is possible, however, that such communication was made, and identified by a third party, on a confidential basis to the government with an expectation that it was capable of being exempted under Section 16 (Solicitor-Client Privilege) of the *Act*. In some circumstances an exemption has been claimed for such communication under s. 16. There is also the possibility that, depending on the circumstances, some might argue that any claim for solicitor-client privilege had been waived because the information had been provided to government. The status of such records when subject to a FOIPOP application is thus not completely clear. The present wording of the *Act* thus leaves open the possibility that an outside third party might obtain via a FOIPOP application, information which would normally be confidential to the parties in legal negotiations.

Recommendation #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*.

and

Recommendation #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.

The purpose of the *NS Freedom of Information and Protection of Privacy Act* clearly recognizes the right of individuals to access and correction of personal information about themselves and sets out the conditions to prevent the unauthorized collection, use, or disclosure of personal information by public bodies.

However, Nova Scotia legislation does not require informed consent for the collection, use and disclosure of personal information. Informed consent is the foundation for all fair information practices and should be an integral part of any privacy legislation. The Nova Scotia *FOIPOP Act* does not require that the information be collected directly from the individual for specific, identified purposes, or that the use of that information be only for the purpose that it is collected. These are all first steps in effective information management.

Legislation in other jurisdictions does have such provisions subject to certain exceptions.

The legislation also needs to reflect the current approach to protection of privacy. The proposed amendments to Sections 24, 26 and 27 are in keeping with the principles of the Canadian Standards Association's *Model Code for the Protection of Personal Information*, the current *OECD Fair Information Practices* and the federal *Personal Information Protection and Electronic Documents Act* (PIPEDA).

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

The principle was already established in Nova Scotia legislation that any person acting on behalf of, or under, the direction of the head of the public body would not be liable for the inappropriate release of information, or the failure to give notice, if done in good faith (s. 46). However, it failed to cover the opposite side of the coin, i.e. the failure to disclose information in good faith. This would bring the NS legislation in line with those jurisdictions who have included this contingency in their legislation (Alberta, Manitoba and British Columbia).

Recommendation #42: Add a specific provision that provides in Section 49 for defining or determining what is "personal information" by regulation.

While the *Act* provides for the expansion or restriction of a definition of a term in the *Act* [cl. 49(p)] by regulation, it does not permit the changing of a definition that is already in the *Act* [cl. 49(o)]. This recommendation highlights the view that the definition of "personal information" is an important part of the *Act* and, as such, any further expansion or restriction (as suggested in recommendation #5) of the definition should have specific regulation making authority. It is, therefore, suggested that clause 49(p) be amended to add "including personal information" after the words "word or expression".

We trust that this will provide some clarifications on the recommendations as well as some explanations as to the rationale for making the suggestions. Please do not hesitate to contact me if you have any further questions.

Yours truly,

Robert P. Doherty
FOIPOP Coordinator