SUPPLEMENTARY SUBMISSION OF THE FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY REVIEW OFFICE TO THE REVIEW COMMITTEE - AUGUST, 2003

We have read carefully the submissions made to the Review Committee all of which were provided to the committee after the initial Review Office submission. Since then the Review Office has provided the committee with statistics showing the effects of the fee increase imposed in April 2002. With this submission we want to offer our comments on some of the matters referred to in the other submissions.

1. Training and Development for FOIPOP Administrators

The submission of the FOIPOP Administrators speaks to the value of courses on "access and privacy" offered, on line, by the University of Alberta Extension Department. We recommend that the Committee's report draw attention to these courses and the importance of making them available to all FOIPOP Administrators, particularly those within government and major institutions such as universities, the health districts and the Halifax and Cape Breton regional municipalities.

2. Routine Disclosure of Records

The Review Office commends the initiative of the Government in developing its Guidelines for Routine Access to certain government records. It is hoped that this initiative will not stop there. The Review Office asks that the Committee take note of this venture and recommend that the Government proceed with all haste in the next step of this project which is to develop " Routine Access Policies" for each department.

3. Investigation of Privacy Complaints

We are pleased to read that the FOIPOP Administrators have taken a position addressing the need for amendments to the Act to provide for an investigation by the Review Officer into privacy complaints. They also recommend that there be amendments to provide for specific remedies where there has been an inappropriate collection, use or disclosure of an individual's personal information by a public body. The Administrators no doubt recognized that a public body cannot agree to access requests before examining what, if any, personal privacy implications may exist.

Nova Scotia's FOIPOP Act is unique for not including the investigation of privacy complaints among the Review Officer's powers. .

In their submission to the Committee, the Council of Nova Scotia University Presidents opposed any extension of the powers of the Review Officer to allow for the investigation of privacy complaints. Since universities are depositories of the personal information of thousands of students, it would be unfortunate to deny the students access to an independent investigation of

their privacy complaints.

Universities are already bound by the Protection of Personal Privacy provisions of the Act but without any recourse for an independent investigation and remedy, those provisions are without teeth.

To have an important part of our Act without independent oversight would appear to be a major omission. We propose you recommend that the legislature provide the Review Officer with a specific mandate to investigate personal privacy complaints.

With respect to the ability of the Review Officer to conduct independent audits of privacy protection practices of public bodies, all public bodies should be concerned with the quality of the security procedures they have in place to protect the personal information they need to collect about individuals. Independent audits should be welcomed as a means of seeking assurance that the public bodies are living up to their obligations under the Act. Audits should not be seen as snooping by an outsider. An audit is a collaborative effort in which the public body and the Review Office share the same public interests... how to improve the protection of an individual's personal information and privacy.

There have been several examples recently where an audit may have prevented an inadvertent disclosure of personal information. One example involved the N.S. Public Service Commission when it was reported to them that personal information about job applicants was available to anyone searching their website.

In another recent event an employee of Service Nova Scotia and Municipal Relations was able to delete her own speeding ticket from a data base containing confidential information about Breathalyzer tests, speeding tickets and motor vehicle accidents belonging to thousands of Nova Scotians. The new procedures ordered by the Department might have been in place earlier if there had been formal collaboration with the Review Office.

The response of SNSMR to my request for more information on the motor vehicle database also points to the need for independent oversight. The response was to suggest that if I were contacted I should refer the complainant to the Department which would provide assurances the "glitch" was a rare occurrence and that the system had been working well for ten years. In effect the Department is making its own judgement on whether the system which it operates is secure. Provisions in the Act for an independent oversight could reinforce those assurances to the public and recommend ways to improve the system. Individuals are more apt to accept assurances from an independent oversight officer than from the public body responsible for the error in the first place.

Participation by public bodies in privacy investigations and audits may be time consuming and require financial support. However this must be balanced against the important objective of ensuring the security of personal information which is increasingly being collected by our public bodies.

The Review Office also recognizes that investigations and audits should be done with the utmost care and discretion, and with common sense. It need not be as disruptive as some public bodies might contemplate.

The thorough submission from the Capital Health District Authority argues that because Nova Scotia is a small jurisdiction the Review Officer does not need the privacy audit and investigative powers that other provincial and territorial Commissioners have. I'm sure Capital Health would agree that the people of Nova Scotia deserve no less personal privacy protection than individuals in other provinces and territories.

The Nova Scotia legislation gives the Review Officer the power to act only after the fact. This means I can act only after I receive a request for review. Other Provinces have concluded the Act works best when the Commissioner can get involved in access and privacy issues without a request. It appears to me that public bodies would welcome involving the Review Officer in the formulation of policies in areas within his knowledge of expertise.

This power is explicitly provided to the FOIPOP Commissioner in most provincial and territorial FOIPOP Acts.

Section 53(1) of the Alberta Act reads: "the Commissioner is generally responsible for monitoring how this Act is administered to ensure that it purposes are achieved". The Commissioner may make an order on privacy matters whether or not a review is requested. He may also invite and receive comments from the public concerning the administration of the Act and "engage in or commission research into anything affecting the achievement of the purposes of the Act."

Section 54 of the that Act says the head of a public body may ask the Commissioner for advice and recommendations on any matter respecting any rights and duties under the Act.

Section 42(1) and (2) of the British Columbia Act empowers the Commissioner to act pro-actively in some dozen or more areas of interest, including:

- conduct investigations and audits to ensure compliance with any provision of the Act,
- make an order on privacy matters whether or not a review is requested,
- inform the public about this Act

In Ontario, section 59 of their Act sets outs the powers and duties of their Commissioner which includes:

- offer comment on the privacy protection implications of proposed legislature schemes or government programs;

The Ontario Information and Privacy Commission also investigates privacy complaints brought forward by individuals or may conduct privacy investigations initiated by the Commissioner herself.

Section 50 of the new Prince Edward Island Act lays on the Commissioner the responsibility to monitor the Act. In addition the P.E.I. Commissioner has been specifically given the responsibility to investigate and attempt to resolve complaints that personal information has been collected, used or disclosed in violation of Part II of their Act which deals with the protection of privacy.

Section 49 of the Manitoba Act authorizes the Ombudsman to investigate, audit and make recommendations to monitor and ensure compliance with the Act and to specifically " comment on the implications for access to information or for protection of privacy of proposed legislative schemes or programs of public bodies".

It is clear that the purposes of our Act would be better served if the Review Officer had similar powers as those provided to other Canadian Information and Privacy Commissioners.

4. Health Privacy Legislation and Privacy Legislation for the Private Sector

I urge the Committee to recommend to the Government that it introduce health privacy legislation and privacy legislation for the private sector.

A. Health Privacy Legislation

The security of personal health information held by public bodies has become a major concern of health care officials everywhere. Such concern sparked the recent formation of a new unit in our Health Department, the Information Access and Privacy Unit.

Alberta and Manitoba now have their own health information protection legislation, with independent oversight provided by the Information and Privacy Commissioner in Alberta and the Ombudsman in Manitoba. (Ombudsman's offices in Yukon, New Brunswick and Manitoba are also responsible for overseeing the access and privacy legislation).

Some parts of the health system are captured under existing provincial and territorial public sector legislation but there appears to be considerable confusion over whether the privacy provisions of the *Personal Information Protection and Electronic Documents Act (PIPEDA)* apply to health care. This is so because PIPEDA targets commercial activity and it is not clear what constitutes commercial activity in health care There is some question whether PIPEDA applies to provincially funded health service providers. The best solution in my view is for Nova Scotia to follow the lead of Alberta and Manitoba, and ensure the protection of the personal health information of Nova Scotians by introducing its own legislation.

B. Privacy Legislation for the Private Sector

In her speech to a privacy symposium held by the Continuing Legal Education Society of Nova Scotia in March 2002, Heather Black, General Counsel for the Federal Privacy Commission, encouraged provinces to enact their own privacy legislation so as "to maintain a level of personal information privacy protection for all of their constituents". She pointed out that when the federal Act comes into force in January 2004 in provinces without substantially similar legislation, many Nova Scotians will still be without legislated privacy protection.

PIPEDA will apply to all interprovincial/ international disclosures of personal information made by an organization in the course of commercial activity. It will apply as well to federally regulated bodies. It will not cover the personal information of Nova Scotians employed within the provincially regulated private sector or to the personal information of those employed in non-commercial activities.

The privacy of employees of "public bodies" as defined in our provincial Act is covered by our Act, although, as noted earlier, there is an urgent need for amendments to strengthen these privacy sections.

The General Counsel for the Federal Privacy Commission went on to argue that provincial privacy legislation will "allow(s) for the unique character and needs of each province to be appropriately factored into legislation rather than being collapsed into the general 'federal' standard. And when PIPEDA and province-specific privacy legislation work together, it creates a seamless entitlement to basic privacy guarantees without sacrificing those unique provincial identities and requirements".

5. Vexatious and Frivolous Applications

Individuals will understandably be concerned about providing a public body with the power to determine and dismiss applications as "frivolous" or "vexatious" unless it is clear that a decision to dismiss an application must be approved by the Review Officer. This requirement is essential. A review by the Review Officer resulting only in a recommendation to the public body as to whether an application should be dismissed or not, will not meet the legitimate concerns of access advocates.

One accepted definition for "vexatious" is "annoying". One might expect public bodies, from time to time, to find applications "annoying". Therefore, a public body's decision to determine an application to be "vexatious" should be closely monitored.

NOTE: The Review Officer already has this power with respect to the approval of a time extension for a public body to make an access decision.

6. Delegation of Power to Review Office Staff

A comment on page 7 of the submission from Capital Health makes it clear that an amendment is required in the Act to allow the Review Officer to delegate to members of the staff of the Review Office the authority "to require to be produced any record that is in the custody or under the control of the public body" and the authority to review records. Although Capital Health is the only public body to question the right of staff of the Review Office to examine all records, an amendment is necessary to avoid any misunderstanding. The Review Office could not function unless all staff had access to the records necessary to a review.

7. Annual Reporting Requirements

The Review Office supports the recommendation made by the FOIPOP Administrators that the Act be amended to require the Minister of Justice provide an annual report to the legislature on the experience of the government with the FOIPOP Act during the previous calendar year.

This happens in a number of other jurisdictions and it is an invaluable tool for both the public and the government by which to measure the health and vigour of the Act.

8. Designation of Administrators and Mediation

In their submission the FOIPOP Administrators raise the important issue that the "head" of the public body should delegate decision making on FOIPOP applications to the appropriate FOIPOP Administrator. To quote from their submission the Administrators say: "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 Review Office supports this position not only because FOIPOP administrators hold and should hold a unique position in their departments but also because a delegation of decision making to the administrators is important for the success of the mediation process.

While mediation is not a mandatory part of the review process, the Review Office supports it as the preferred method of dispute resolution at the review stage and encourages it in every request for review. Because mediation is fundamentally a voluntary process which both parties must "buy" into, the Review Office does not support an amendment to the Act which would make mediation a mandatory part of the process. That being said, the Review Office supports every effort to make the mediation process stronger and more productive for all parties involved. That process would be improved if decision making on FOIPOP applications was delegated to the Administrators. This would avoid the situation of both parties mediating in good faith only to discover that the Administrator cannot commit to an agreement because he or she does not have the authority to do so.

9. Officer of the Legislature

We reiterate our comments made in our earlier submission that the Review Officer should be made an Officer of the Legislature reporting directly to the Legislature. The independence of this office from any perceived government interference, real or imaginary, should be protected.

This change is in the best interests of the government and the public and is necessary for the healthy functioning of the Act. In every other province and territory, the Information and Privacy Commissioner is a legislative officer.

10. Penalties

The Committee has asked me to expand on my recommendation that, with respect to Section 47(1)(A) of the provincial Act and Section 500 of the Municipal Act, a penalty be imposed as well for misleading the Review Officer.

I refer you to Section 74(1) of the British Columbia Act.

> **Offences and Penalties**
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> **74(1)** A person must not willfully do any of the following
>
> (a) make a false statement to, or mislead or attempt to mislead, the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;
>
> (b) obstruct the commissioner or another person in the performance of the duties, powers or functions of the commissioner or other person under this Act;
>
> c) fail to comply with an order made by the commissioner under section 58 or by an adjudicator under Section 65(2).
>
> (2) A person who contravenes subsection (1) commits an offense and is liable to a fine of up to $5000.

To impose a fine for misleading an applicant but not for misleading the Review Officer would appear to be an inadvertent omission.

Thank you for receiving this supplementary submission.