

Good morning and welcome to our discussion on the balancing of the public's right to know with Government's need for discretion.

Pursuant to the Freedom of Information and Protection of Privacy Act and Part 20 of the Municipal Government Act, all provincial public bodies, municipalities, local public bodies, universities, school boards, health authorities and municipal police departments are obliged to adopt a policy of accountability, openness and transparency and to provide a right of access to information, with limited exceptions.

Since 1994 the Freedom of Information and Protection of Privacy legislation has included an opportunity for an independent review by the Review Officer. The staff of the Review Office, support the Review Officer to resolve freedom of information access appeals through research, investigation, analysis and mediation. If a matter cannot be settled informally or through mediation, it is referred to the Review Officer for formal Review.

The Review Officer does not have the power to make final and binding orders. However, she does have the power to require a public body to produce any document for her review that she feels is relevant. She may also enter and inspect any premises occupied by a public body. Once a Review has concluded and the Review Officer has considered the arguments of both parties, she will produce a Report, which may make recommendations to the public body. The public body is obligated to respond to these recommendations in writing. If the applicant or a third party is not satisfied with the outcome of a Review, an appeal may be made to the Supreme Court of Nova Scotia.

The Acts contain 14 exemptions outlining when information can be withheld. There are two instances where information must be withheld – in the case of personal information and confidential information, which is also referred to as business information. There are 12 instances where information may be withheld at the discretion of the public body if the information squarely fits into the definition or wording of the exemption. I won't name them all, but a few are: solicitor-client privilege, law enforcement and advice to a Public Body or Minister.

When it comes to discretion, Section 42(6) of the Act states that once the Supreme Court of Nova Scotia finds the record falls within an exemption, it cannot order the disclosure of a record, "regardless of whether the exemption requires or merely authorizes the head of the public body to refuse to give access to the record". So, if the document meets the criteria of a discretionary exemption, the court has no power to order disclosure, even if the court might have exercised its discretion differently.

The same cannot be said for the Review Officer. Section 39(2) allows the Review Officer to "make any recommendations with respect to the matter under review that the Review Officer considers appropriate". Therefore, the Review Officer can and has made recommendations regarding a public body's exercise of discretion. The Review Officer has adopted a list of factors for a public body to consider in exercising discretion:

In inquiries that involve discretionary exceptions, public bodies must establish that they have considered, in all the circumstances, whether information should be released even though it is technically covered by the discretionary exception....

In exercising discretion, the head considers all relevant factors affecting the particular case, without repeating them all here, some to be considered are:

- *the nature of the record and the extent to which the document is significant and/or sensitive to the public body;*
- *whether the disclosure of the information will increase public confidence in the operation of the public body;*
- *the age of the record;*
- *whether previous orders of the Review Officer have ruled that similar types of records or information should or should not be subject to disclosure*

If irrelevant considerations are taken into account or relevant ones are not, there has been an error in the exercise.

This is an exercise, which means that the Administrator must do some work. It is not a formality. They must think about each piece of information that they wish to sever. It would be a good idea to log or make notes on the reasons or factors that were considered during the exercise. If the access request was ever to come to Review, it is likely that they will be asked to show this. The Administrators rationale must be demonstrable and reasonable. Arbitrary or irrational decision-making is not acceptable.

So in conclusion, although an exemption is discretionary and the public body can refuse the information, merely throwing a blanket over information and withholding it because it can be withheld or because of the “type” of information that it is, is not in keeping with the purpose of the Act which is to ensure that public bodies are fully accountable to the public by giving them a right of access to records and specifying limited exceptions to this right.

Thank you.

-Prepared for Carmen Stuart by Mary Kennedy