



ANNUAL REPORT

for the period

October 1, 2001 to December 31, 2002

**NOVA SCOTIA
FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY
REVIEW OFFICE**

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**Nova Scotia Freedom of Information and Protection of
Privacy
Review Office**

February 7, 2003

The Honourable Murray Scott
Speaker
The Legislative Assembly
Province of Nova Scotia

Sir:

In accordance with Section 33(7) of the **Nova Scotia Freedom of Information and Protection of Privacy Act**, I am pleased to present to you, and through you to the Members of the Legislative Assembly, the Annual Report of the Review Office for the fifteen month period from October 1, 2001 to December 31, 2002.

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Darce Fardy', written in a cursive style.

Darce Fardy
Review Officer

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INTRODUCTION:

My annual report is laid before the House of Assembly in accordance with Section 33(7) of the Freedom of Information and Protection of Privacy Act. The Review Officer is an independent ombudsman, appointed by Order-in-Council for a period of not less than five years or more than seven. Although not an Officer of the Legislature, the Review Officer can be removed from office by the Governor-in-Council only following a House of Assembly resolution with a vote of the majority of the Members of the House.

The Review Officer reviews decisions of public bodies, municipalities and local public bodies following applications for access to information made in accordance with the Act. The Review Officer may make recommendations to public bodies to change or adjust their decisions or may confirm the decision of the public body.

My first two annual reports were tabled during the fall sessions of the Legislature. From now on they will cover the calendar year. To make the change it was necessary to break our statistics into two parts: from October 1 to December 31, 2001, which was not covered in my 2000-2001 report, and from January 1 to December 31, 2002.

REVIEW OFFICER'S MESSAGE:

ACCESS:

Some Good News:

As all parties become more familiar with the legislation it becomes apparent that many records could be made public without the need for making an application under the *Act*. A government committee has drafted a policy for submission to the Deputy Ministers. The report of the Government committee on "routine disclosure", a draft of which I have read and commented on, is a positive sign. If the report is approved by the Deputy Ministers, some documents will be available on request without requiring individuals to make formal applications under the *Act*.

I trust the approved routine disclosure report will become government policy for all its departments and agencies. This approach will reduce the number of applications for access.

...

In my last annual report I singled out the Department of Economic Development, now the Office of Economic Development (OED), for a less than satisfactory performance in the handling of applications for information under the Act. The responsible CEO, the FOIPOP administrator, borrowed from the Public Prosecution Service, and others who assisted are to be commended. It shows that with a positive approach, and support for this important legislation, problems can be solved.

...

The attention this Act received during the Fall-2002 session of the Legislature is very encouraging. Both opposition parties tabled "private members'" bills which addressed amendments to the Act. While the bills were not adopted into law, the legislators' attention to this Act is important.

...

This Office welcomes the appointment of a committee to review the Act. I have provided a written submission to the committee and, at the time of writing this annual report, I am preparing to appear before it. (My written submission can be found on the Review Office web site www.gov.ns.ca/foiro/) It's my hope the committee will complete its review with dispatch and that government will act on it without undue delay.

...

Public bodies recognize that improvements are needed in their records management. Searching for records causes delays in response to applications, with the possible consequence of rendering the information of little or no interest to the applicant. The spirit of the *Act* requires that the information be provided as quickly as possible, despite the response time in the *Act*. Applicants should not have to pay, through user fees, for the time taken searching for records that are not properly filed.

Relationship Between the Review Office and Government:

This Office does not experience the kind of relationship with government that I believe must exist between them. In 2002 this manifested itself on several occasions.

This Office received little or no notice of, and was offered no opportunity for consultation on, some major new initiatives in the past year, including the formation of an internal committee to consider a "routine disclosure" policy (this Office became involved only after it learned indirectly that the committee was formed and meeting); the appointment of a committee to Review the *FOIPOP Act*, which we learned about from a journalist; an increase in fees; and a change in the *Regulations* redefining the phrase "background information". The Review Office does not expect to be asked to approve or veto a government decision but one would hope that a government would consider it useful to consult with the Review Office on new initiatives and to provide adequate notice of impending announcements.

The basis of the relationship between government and an independent agency of government needs to be one of trust, respect and professional courtesy. The Review Officer must believe, unless shown otherwise, that public bodies are acting in good faith, and public bodies must be satisfied the Review Officer is also acting in good faith. Differences of opinion and some conflict are expected but it's essential that the relationship remain professional and courteous. I hope to discuss this with the appropriate officials.

Other access and privacy legislation in the country recognizes the importance of consultation and cooperation between the independent oversight officer and public bodies. The new legislation in Prince Edward Island encourages public bodies to seek advice from the Information and Privacy Commissioner. In Alberta, the Government cites and supports the Commissioner's rulings in its access and privacy manual.

Centralizing Decision Making:

While a common response on applications for access to information that falls under a mandatory exemption can be expected, public bodies should be encouraged to use their own discretion in considering non-mandatory exemptions. As administrators become more and more experienced and knowledgeable about the *Act* they may be less likely to toss the ball to others.

Any move towards centralizing decision making should be resisted.

The FOIPOP Administrators:

While the continuing development of professional FOIPOP Administrators is encouraging, the background and experience of many of them run the gamut. I urge the Government to invest in the professionalization of its FOIPOP administrators and raise the profile of the important values of access and privacy in its individual departments. The administrators' duties are more than clerical. They are, or should be, involved in making countless important decisions, balancing the rights of individuals and interpreting and applying the *Acts*.

A number of them, many with other responsibilities didn't ask for the assignment. It is time that the Government and local public bodies recognize their important work and give them proper training and support to complement their daily responsibilities on the job. Some may need more human and financial

resources, all of them need moral support from their Ministers, their Deputy Ministers, their Town Councils or their Chief Executive Officers.

In recognition of this emerging field, the University of Alberta has a certificate program in the area of government studies called: *Information Access and Protection of Privacy Certificate Program*. I recommend it be offered to FOIPOP administrators. I know of one who is taking it.

I believe that once the FOIPOP administrator group is afforded the appropriate training, support and profile within the public body, we will have a respected group of access and privacy professionals clearly competent to exercise their own discretion in accordance with the Acts with the full confidence of those they report to.

The Act names the Minister as the “head” of a government public body. Section 44 allows the head of the public body to delegate, in writing, the powers provided to the “head” in the Act. Some FOIPOP administrators have been delegated all of the powers and duties of the “head”. Some have partial delegation and many have no formal, written delegation. Mediation, an important part of the review process, is more difficult when the administrator involved in the mediation cannot make a final decision. I urge the “heads” of public bodies to delegate their powers to the FOIPOP administrators. I hope the Minister responsible for the administration of this Act will show his support for this.

FOIPOP Administrators should enjoy considerable independence. They should be promoters of access and privacy within their departments, carrying with them an attitude of openness and transparency. They must be prepared to balance the interests of the public body with the rights of the individual under this Act. Happily some of them fit this description but too many do not.

The Urge to Find Ways to Deny Access:

Despite the encouraging progress made in developing professional administrators there are still some who appear to put more energy into finding reasons to refuse disclosure than they do in finding reasons to disclose. They should change their ways. It is very disappointing to see some administrators cite every conceivable exemption in their decisions on applications. That approach is not in the spirit of the Act. In fact it doesn't meet the clear expectations of the Act itself (found in Section 2) that exemptions be “limited and specific”. Such an approach also ignores the admonitions of the Nova Scotia Supreme Court that public bodies interpret the Act liberally with a view to disclosure. (See *O'Connor v. Nova Scotia* (2001); *Chesal v. the Attorney General of Nova Scotia* (2003); *Dickie v. Nova Scotia (Department of Health)* (1999); *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993)).

Making decisions adhering strictly to the letter of the law is also contrary to what the legislature intended and the courts endorsed, particularly in jurisdictions, like this one, where the Review Officer does not have the powers to make orders. To quote Canada's Privacy Commissioner:

Looking beyond the letter of the law to better capture its spirit, is specific to the ombudsman model.

The Adversarial Approach:

Some public bodies still adopt an adversarial approach to the Review Office. This, in my view, is damaging to the interests of this important legislation. Some see it as a win or lose proposition. It is neither. It is a matter of interpreting the Act in the best interests of the public it is meant to serve, keeping in mind that on rare occasions it is necessary, in the interests of good government or to protect personal privacy or confidentiality, to deny access. Both the Review Office and government must be committed to promoting the interests of the legislation.

Fee Increases:

In my annual report of 2000-2001 I commended the Government for avoiding fee increases for access to information under this *Act*. In 2002, the fee for an application was raised from \$5.00 to \$25.00 and a fee of \$25.00 was imposed on Requests for Review which previously had been free of cost. The charge for administering applications was raised from \$10.00 a half hour to \$15.00 a half hour. The waiver of charges for the first two hours of locating documents has been removed.

The fees attached to this *Act* are now the highest in the country. I expressed my disappointment with this large increase in public comment and before the Legislature's Law Amendments Committee. I was somewhat reluctant, as an unelected government appointee, who is not an Officer of the Legislature, to appear without an invitation. However, I thought it important to clear up an impression left by the Government announcement which said it was following the lead of Ontario and Alberta. I noted that while Ontario had an appeal fee of \$25.00 its application fee was \$5.00 and Alberta, with a \$25.00 application fee had no fee for a review.

I expressed the view before the Committee that fees are not intended to represent cost recovery and that the costs attached to administering this *Act* represent small fractions of the budgets of the government, municipalities and local public bodies.

This Government has been commended for the improvements it made to this legislation when it extended its coverage to hospitals, universities, colleges and school boards. The large fee increase was a disappointment.

The results of the fee increase, so far as the requests for review are concerned, can be found in the statistics:

- The number of Requests for Review fell by 26% from 2001 to 2002 (Table 1);
- The number of reviews of decisions of hospitals, school boards, universities and colleges dropped 73% over the same period (Table 1); and
- Reviews of decisions by provincial public bodies fell 18% (Table 1).

It might be argued that this merely shows that public bodies and local public bodies have been more open in 2002, but we have no evidence to support this.

Chart 1 shows the drop more demonstrably. So does Chart 2 and Table 4 which provide a quick look at the drop of the number of review files opened after the fee increase was imposed. While the charts show the usual fluctuation in the figures it is clear that there was no recovery during the last three quarters of 2002 after the fee increase.

An Anomalous Situation:

Nova Scotia is unique with an independent oversight officer for information and privacy legislation who is not an officer of the legislature. This administration brought in amendments to the *Act* further protecting the independence of the office by requiring a majority vote of the Legislature to remove the Review Officer from office. Another amendment requires the Review Officer to issue an annual report to the Legislature. The final step needs to be taken. Later in this report I will be making a recommendation for a change in the legislation, which, incidentally, would require no extra government funding.

Appointing the Review Officer as an officer of the Legislature would further reaffirm his independence and provide the legislators with the opportunity to invite him to appear before the appropriate standing committee. I would welcome an opportunity to appear before a committee of the Legislature to discuss and answer questions about my annual report and the activities of this Office.

Who Needs to Know:

In my last annual report I expressed my concerns that the names of applicants may be too widely distributed within public bodies. I believe there has been some improvement since then but nothing has changed my view that no one but the administrator who receives the application needs to know the name of the applicant. It may be natural that other officials consulted by the administrator will ask: "Who wants to know?". But the name of the applicant is irrelevant and the administrator should not be asked. If the decision on an application is made by someone other than the administrator who received it, that person should be prepared to make the decision without knowing if the applicant is a journalist, a member of an opposition caucus, a spokesperson for an environmental protection group, or a private citizen.

The *Act* recognizes the importance of keeping the names of the parties private. It obliges an administrator to refuse to disclose the name of the applicant to a third party or vice versa. Administrators should also be obliged not to disclose the names of the applicants to others except under those circumstances where it is necessary, i.e. another employee of government must search for the information sought and requires the name of the applicant to do so.

PRIVACY:

As predicted in my last annual report (2000-2001), there is a growing interest among Nova Scotians in ensuring the protection of their personal privacy. Concerns are often expressed in telephone calls to this Office. Many of the callers lodge complaints against the private sector. Without any legislation at this time requiring personal privacy protection in the private sector I can do no more than advise them to issue their complaints directly with those they believe have disclosed their personal information. This will change in January 2004 when the Federal private sector personal information protection act, *Personal Information Protection and Electronic Documents Act (PIPEDA)* comes into force in the provinces unless they pass their own legislation which must be "substantially similar" to the Federal legislation.

A recent issue of the on-line magazine, *Privacy Horizon*, describes privacy in health care as "a billion dollar issue". As governments and health organizations invest heavily in electronic health records and other systems, there is almost universal agreement that this kind of technology in health care is a good thing. But nothing is more important to individuals than the privacy of their personal health information. Without those assurances, the public could be reluctant to participate in new systems.

The three prairie provinces have passed health information privacy legislation, although Saskatchewan has yet to proclaim it. A competent and enthusiastic unit of the Department of Health has been looking at the issues and I hope their efforts will lead to Nova Scotia's own health information privacy legislation.

The Power to Investigate and Report on Personal Privacy Complaints:

In my 2000-2001 annual report, I asked for an amendment to this *Act* to provide the Review Officer with an explicit legislated mandate to investigate and report on privacy complaints. I wrote that the need for such a mandate is urgent.

In the absence of an explicit mandate, I have investigated and reported on privacy complaints against some public bodies. However I can do this only when public bodies agree to co-operate. Nothing in the *Act* obliges them to. It is arguable that the Review Officer's mandate to investigate privacy complaints is implicit because under the existing legislation this Office provides independent oversight over the entire *Act* including the protection of privacy sections.

In the fifteen months covered by this annual report, I received six formal privacy complaints and investigated and reported on four of them. I received two from Dalhousie University students but the

university said it would not be responding to my request for information because I “have no authority under the *Freedom of Information and Protection of Privacy Act* to entertain complaints and to issue reports in response to them”. The reaction of the Province’s major university, which holds so much personal information about its students, is unfortunate. One would think it would welcome independent oversight as some other public bodies and local public bodies have.

Public bodies which cooperated with my investigations include the police, another university, a government department and a government agency.

Public bodies which consulted with me on privacy matters include the Departments of Health and Education, the New Glasgow Police Department and several school boards.

I believe providing the Review Officer with the legislated mandate to investigate and report on privacy complaints becomes more important as interest in privacy grows in this Province. A modest budget increase would be needed to undertake the responsibility.

MEDIATION: A SYNOPSIS

“The Review Officer may try to settle a matter under review through mediation”. (Section 35 of the provincial *Act* and section 489(20) of Part XX of the *Municipal Government Act*).

The Review Office has a mediator/investigator who carries out the mediation stage of the review process. Mediation, simply defined as negotiation between parties assisted by a neutral third party, is the preferred method of dispute resolution at the Review Office.

There are undisputed benefits to settling a dispute through mediation. Some of the key ones are:

- Better results: The process allows for more flexibility and creativity in the resolution to the dispute.
- More satisfaction: This is so because the parties keep control of the process and create their own settlements.
- Speed: Often faster than the formal review process.
- Cost: An early resolution of the dispute will result in savings of time, emotion and sometimes money.
- Positive relationships: Relationships between the public body and the applicant are improved through a better understanding of the other’s position.

An increasing number of reviews are settled through mediation and even when reviews are not fully settled, many are resolved in part, meaning that fewer issues and/or records proceed on to the review stage.

Mediation under the *Act* faces some challenges not found in a more typical mediation. Some such challenges are:

- Lack of Commitment: Some public bodies decline to enter into the spirit of the mediation process and thus fail to take advantage of its benefits. From the outset they insist there can be no change in their position since their initial decision is “correct”.
- Power Imbalance: More so than in other disputes there is a significant power imbalance in favour of one of the parties - the public body. The public body knows and has control of the information that is being denied and the applicant does not.
- Actual Process: In a typical mediation, the mediator will call a meeting of the parties, put all the information on the table, engage in a discussion of each party’s specific interests in having the matter settled and explore various options to settle. That approach is not possible under the Acts since the mediator must ensure the material in dispute is not disclosed during mediation. So meetings and more usually telephone calls can take place with the parties but without the benefit of everyone having the same factual information.

Despite these challenges, the mediation process under the *Acts* has a growing success rate (Chart 8). But there are things that can be done to further improve the situation:

- There needs to be a clear commitment by all parties to the principles of mediation and a corresponding investment in the mediation process.
- All parties must bring a non-adversarial approach to the process. Parties, particularly FOIPOP administrators, need to think creatively as to how the matter might be resolved. For example, if the public body believes that certain information should not be disclosed is there other similar information that can be shared with the Applicant which will satisfy the interest of the Applicant?
- To engage in serious mediation, an administrator must be in a position to make the decision. Over the last twenty years the use of mediation for dispute resolution has grown enormously. It is now widely accepted in many different areas of law and its application is expanding to almost every conceivable type of dispute.

The statistics (see Table 6) show that the Departments of Transportation and Public Works, Service Nova Scotia and Health have been the most responsive to mediation and are to be commended.

OFFICE ACTIVITIES:

In November of 2002, this Office invited all FOIPOP administrators in the general Halifax area, to an information session designed to provide them with a review of this Office's expectations and to answer any questions and concerns. I am told those who attended found it a very useful exercise. The administrators represented the provincial government, municipalities, hospitals, universities and school boards. The Halifax Regional Municipality sent more than ten of its employees, reflecting HRM's interest in promoting openness and accountability within the Municipality.

...

In 2003, we plan to provide similar information sessions for administrators and others in other parts of the Province. Plans are underway to hold a session for journalists, caucus office researchers and other regular users of the *Act*.

...

In 2002, the Review Office and the Information and Privacy Commission in Ontario, arranged an exchange of personnel. Susan Woolway, this Office's mediator/investigator, is spending eight months in the Ontario Commissioner's office and Giselle Basanta is in Halifax with the Review Office. No public funds were spent on this useful exchange. They return to their own offices on May 1.

...

In 2002, we hired a new Case Review Analyst. Matt Young is also a part-time law student. The energy of the case review analyst and the mediator allowed the Office to arrange information sessions while meeting the daily demands of the Office.

The staff remains at three, including the Review Officer. I believe Nova Scotians are getting a good bang for their bucks. See budget details later in this report.

THE REVIEW OFFICER'S ACTIVITIES:

- In March I participated in a panel discussion at a symposium on privacy rights hosted by the Continuing Legal Education Society of Nova Scotia and Dalhousie University.
- In April, I wrote to the Halifax Regional Municipality's Police Chief expressing my concern over proposals to set up cameras on Spring Garden Road as part of its crime prevention program which I believe would constitute an unwarranted invasion of personal privacy. I made the same observations in a letter to the New Glasgow Police Chief.
- On May 8, I appeared before the Law Amendments Committee of the Legislature to express my concerns over the increase of fees for access applications and the imposition of fees for a Review.
- In June, I attended the annual meeting of the Information and Privacy Commissioners in Toronto.
- In September, 2002, I attended the annual meeting of the Council on Government Ethics and Law held in Ottawa.
- In November 2002 I attended a privacy and security workshop in Toronto.
- In November, 2002 with other Information and Privacy Commissioners I was invited to attend a workshop hosted by the Canadian Institute of Health Research in Ottawa to discuss privacy in health research.
- In November, 2002 I co-signed with other provincial Information and Privacy Commissioners a letter to the federal Minister of National Revenue to express our concerns about the Canada Customs and Revenue Agency's traveller-surveillance database.

APPRECIATION:

A small office in a large bureaucracy depends on some special help from flexible people in order to find its way through the maze. In this report I would like to thank two people:

Jeannette Smith, the Human Resources Director with the Department of Justice, who helped expedite personnel matters; and

Patti MacAuley of Communications Nova Scotia, whose voluntary assistance with our website made it possible for us to improve it and provide regular updates.

RECOMMENDED CHANGES TO THE LEGISLATION:

- The Review Officer be provided with the explicit powers to investigate and report on privacy complaints against public bodies.
- Public bodies be obliged to consult with the Review Officer with respect to the drafting and implementation of programs, policies and practices as they affect personal privacy.
- The Review Officer be provided with the powers to investigate and audit public bodies to ensure compliance with the *Act*, when there are reasonable grounds to do so.
- To further enhance the independence of the Review Officer, the Review Officer be appointed an officer of the Legislature, a standing accorded to the Ombudsman and the Review Office be named a Commission.
- The Review Officer be mandated to inform the public about the legislation.
- Amend Section 47(1)(A), which imposes a penalty for misleading an applicant, to impose the same penalty for misleading the Review Officer.

- Require that the names of applicants be provided within a public body only to those who need to know in order to process the application.
- Provide to the Review Officer the power to delegate the right to review documents to the staff of the Review Office.*
- Provide for confidentiality oaths to be administered to the Review Officer and Staff.
- Add a clause to the *Act* to reflect the obligation placed on the Review Officer and staff not to disclose any information that comes to their knowledge in the performance of their duties.
- Amend Section 11 to provide for a waiver of fees for the first two hours spent locating and retrieving a requested record.
- Amend Section 6 of the Regulations to reduce application fees to \$5.00 and eliminate fees for a Review.
- Allow for a public body to refuse to process frivolous and vexatious applications.**
- Provide the Review Officer with the power to comment on proposed access and privacy legislation.
- Amend the *Act* to provide protection for the Review Officer, or any person working under the direction of the Review Officer, against criminal or civil proceedings for anything reported or said in good faith in the exercise of their duties.
- Amend the *Act* to require that those who receive applications for access to refuse to disclose the names of the applicants except when unavoidable, i.e, another employee must search for the information sought and would need the name of the applicant to do so.
- Amend the Regulations to require public bodies and local public bodies to provide their FOIPOP statistics to the Review Officer.

* This responds to an event when a public body refused to provide copies of relevant records to the Office's mediator.

** One individual, in particular, is abusing the rights this legislation provides. Many of his applications end up in review and seriously distract this small office from dealing with deserving requests.

SUMMARY OF COURT CASES:

Keating v. Nova Scotia (Attorney General) 2001 NSSC 150, 198 N.S.R. (2d) 110

Last year's annual report summarized *Keating v. Nova Scotia (Attorney General)*, 2001 NSSC 85, 194 N.S.R. (2d) 290 which concerned the applicant's request under the *Act* for certain information about allegations of abuse which had been made against him with respect to his former employment.

In that case, the Court allowed the applicant's appeal and found there was no unreasonable invasion of the claimant's privacy and the applicant was entitled to know what he had been accused of and should have the right to correct the record.

Subsequently, the applicant sought costs against the Province, specifically solicitor-client costs. This is the decision on costs.

The Court found that while solicitor-client costs were not appropriate as the conduct of the Province was not reprehensible, scandalous or outrageous, it did find against the Province for the manner in which it administered the *Act* in this case. It awarded costs in the amount of \$17,500 plus taxable disbursements. The Court stated that the applicant was entitled to costs due to the Province's adversarial, unco-operative and possibly obstructive stance in the matter from the time of the initial application for information by the applicant, to and including the hearing of the appeal to the Nova Scotia Supreme Court. The Court concluded that the Crown was "far from forthcoming or cooperative in the conduct of this proceeding."

The decision of the Department went to Review before it went to the courts. The Review Officer recommended disclosure of the information with personal identifying information removed.

French v. Dalhousie University S.H.No. 1711641, January 25th, 2002, 2002 NSSC 22

The applicant, who was the former head of a department at a medical school resigned after receiving a draft report concerning his tenure. He then applied under the *Act* for disclosure of all documents relating to the first term survey, including written submissions. The university refused to release the written submissions on the basis that they contained the personal information of third parties and cited s.20(3)(d) and s.20(3)(g). Those sections address the presumption of an unreasonable invasion of privacy if the disclosure would reveal employment history of third parties or involve personal recommendations or evaluations.

In his Review the Review Officer agreed with some of the severances made by the university but recommended that further material be disclosed. The university refused to accept the recommendations and the applicant appealed to the Court.

The Court found in favour of the applicant and directed there be an even greater disclosure than had been recommended by the Review Officer.

The Court ordered that opinions expressed about the applicant and assertions of fact as to his behaviour or actions, names of the authors and comments on the present or past operation of the school and the department were to be disclosed; references to the names of others, comments concerning the work of others and information on the author's professional or academic background were not to be disclosed.

The Court found that personal views expressed about the applicant did not come within the definition of the term "personal information" as contained in the *Act*.

The University had stressed the fact that the authors of the written submissions had been given assurances of confidentiality. The Court observed that although assurances of confidentiality were an important part of the circumstances to be considered, the disclosure of personal information in the written submissions would not constitute an unreasonable invasion of privacy only to the extent that the information would be necessary for the applicant to have a full understanding of the opinions expressed and assertions of fact made concerning him.

This case is presently under appeal to the Nova Scotia Court of Appeal.

O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat) 2001 NSCA 132, 197 N.S.R. (2d) 154

This case which was summarised in last year's report, addressed the interpretation of the cabinet confidentiality exemption, s.13. The Province sought leave to appeal the Court of Appeal's decision to the Supreme Court of Canada.

On June 13th, 2002 the Supreme Court of Canada refused to grant leave to appeal and awarded the applicant solicitor-client costs against the Province.

SUMMARIES OF SELECTED REVIEWS AND MEDIATIONS:

REVIEWS:

FI-02-23

In this review, the University College of Cape Breton (UCCB) received an application under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for all documents related to an Ethics Committee charge against a former President of the UCCB Students' Union. In its response to the Applicant, UCCB stated that it did not have any records, specifically the letter of complaint, that respond to the application. Information was provided to the review that UCCB made a settlement offer to the respondent to the complaint which was rejected. Further, the respondent was informed by UCCB in a letter that, "because 'no proceedings have gone forward or recommendations made, all materials and correspondence associated with this matter have been destroyed ... in accordance with the practice of the University College.'" In his conclusions, the Review Officer referenced the definition of personal information in section 3(1)(i) of the *Act* and the public body's obligations with respect to the retention of personal information set out in section 24(4) of the *Act*. The Review Officer agreed with the Applicant that the UCCB made a decision, as contemplated by section 24(4) that 'directly affects' the subject of the complaint when it attempted to resolve the matter and therefore had not lived up to its obligations with respect to the retention of personal information.

The Review Officer recommended that UCCB re-examine its practices with respect to the retention of personal information in light of the demands of Section 24(4).

FI-02-56

In this review, the Executive Council (Cabinet) received an application under the *Act* for all information, documents, memos, files, etc. that relate to the decisions by the Province to close/suspend operation of the Nova Scotia Arts Council that exist at the Executive Council Office. In its response to the Applicant, the Executive Council granted access in part to the relevant records, stating that the remaining portions were severed because they contained the confidential deliberations of Cabinet [section 13(1)] and advice to government [section 14(1)]. During mediation, additional documents were disclosed. In his conclusions, the Review Officer agreed that the information at issue "falls under at least one of those two exemptions." However, the Review Officer stated that he was informed by Executive Council that there were no specific guidelines in place for the exercise of discretion, noting that the Executive Council did not provide any factors it considered or the underlying policies and goals of the *Act*. To this end, the Review Officer cited decisions from the commissioners of Ontario and Alberta and the Government of Alberta's manual on Freedom of Information and Protection of Privacy that sets out some factors to be taken into account with respect to the use of discretion.

The Review Officer recommended that the Executive Council follow the lead of the Government of Alberta and develop guidelines for the "exercise of discretion" and encourage other public bodies to do the same.

FI-02-81

The Executive Council received an application under the *Act* for the agendas of certain Cabinet meetings. In its response to the Applicant, the Executive Council denied access to the agendas in their entirety pursuant to section 13(1). In its submissions to the review, the Executive Council stated that it believed that the information contained in the records would permit the reader to draw accurate inferences about the deliberations of Cabinet. In his conclusions, the Review Officer urged that the ordinary meaning of words must be considered harmoniously with the purpose of the *Act*, as endorsed by the *O'Connor*

decision, and the purpose of a particular exemption. He also pointed out that while the public body's sensitivity toward cabinet documents should be respected, that it should be careful "not to throw a blanket exemption over all information that goes before or is prepared for cabinet." In his recommendations, the Review Officer agreed with the definition of advice submitted by the Executive Council but remained unconvinced that the agendas contain *advice* as defined. However, the Review Officer did agree that where the agenda item constituted a summary of the Report and Recommendation to Cabinet, that those portions of the records contained *recommendations* and did attract the protection of section 13(1).

FI-02-84

Nova Scotia Business Inc. (NSBI) received an application under the *Act* for access to a copy of an itinerary showing with whom the Minister of Economic Development met while on a trade mission to Atlanta, Georgia. In its response to the Applicant, NSBI refused most of the information citing, confidential information received from the Federal Government; advice to the Minister; harm to the Government's economic interests; the protection of personal privacy; and harm to a third party's financial or negotiating position. S.12(1)(b) allows NSBI to refuse to disclose information provided in confidence from two federal bodies unless they provide consent. The federal bodies were not asked for consent. When contacted by the Review Officer the two federal bodies confirmed that the information in the itineraries was provided by them in confidence. The Review Officer was satisfied this subsection supports the decision to deny some of the information in the itineraries. NSBI argued that the itineraries contained advice to the Minister [s.14(1)]. The Review Officer disagreed with NSBI that an itinerary can be defined as "advice", and as a result, this exemption did not stand. With respect to s.17(1), the Review Officer concluded that NSBI did not provide adequate proof of harm to the Government if the itineraries were disclosed. The only subsection of s.20(1) argued by NSBI was that the personal information of third parties should be denied because the itineraries contain their "employment history." The Review Officer disagreed with NSBI that the place of work of an individual can be described as "employment history". The Review Officer further concluded that NSBI could not rely on the presumptions found in s.20(3) or in s.20(4), except under part (a) which did not apply because consent was not requested. However, after balancing the relevant factors under s. 20(2), the Review Officer concluded that, in this case, the protection of personal privacy outweighs the need for public scrutiny. Although NSBI was unable to show proof of harm to third parties, because it did not consult the third parties themselves, s.21(1) is a mandatory exemption and as such, the Review Officer consulted the two federal bodies who arranged the itineraries and concluded that s.21(1)(c)(ii) applied.

MEDIATIONS:

Third Party Records/Records Related to Orders-In-Council

A provincial Department received a request for records related to specific Orders-In-Council (OICs). The applicant confirmed that he had obtained copies of the OICs via the Internet, and a copy of some of the related correspondence, but believed additional records existed. The Department at first identified 5 documents and notified a third party whose interests may be affected by the disclosure of these records. The third party objected to the disclosure of the records and the Department disclosed the records with portions severed out. The applicant raised a concern with the mediator that only the five records were identified by the Department as relevant to the application and he believed that more records exist. Specifically, the applicant suggested that there should be a purchase and sale agreement and other related correspondence. After discussions with the mediator and the FOIPOP administrator, both of whom confirmed that most of the severed information was the same as the contents of the OICs posted on the Internet, the third party consented to the disclosure of all 5 records in their entirety. The FOIPOP

administrator also undertook to conduct an additional search for the documents identified by the applicant as missing. As a result of the additional information regarding the type of records that the applicant was seeking, the FOIPOP administrator identified a number of records, including maps, briefing notes, letters and requests for proposals and disclosed most of them with relatively little severances. The applicant was satisfied and the file closed.

Consultants' Reports

A University received a request under the Act for two external consultants' reports in addition to a report completed by an internal analyst. The University denied the applicant access to all the records in their entirety. During mediation, the University revisited their decision and disclosed to the applicant all of the information in the internal report with the exception of the recommendations as per 14(1). With respect to the two remaining reports, the University, notified the third parties whose interests may be affected by the disclosure of these records. In response, one of the external consultants confirmed verbally with the University that it had no objection to the disclosure of the report, and that record was disclosed with the exception of the recommendations as per 14(1). However, the second consultant did object to the disclosure of the remaining report and the University as a result, reiterated its decision to deny the applicant access on the basis of 14(1), 17(1), 20(1) and 21(1). After discussions with the mediator, the applicant indicated that his organization would be satisfied with a copy of the Executive Overview to the report. The University agreed and a revised decision was issued to the applicant with a copy of the 2-page Executive Overview attached. The applicant was satisfied and the file closed.

Contents of a Foster Parent File

A Children Aid Society (CAS) received a request for any or all information contained in the applicant's personal foster care file held at that Children's Aid Society. During mediation, the applicant confirmed that she already had a number of records that were at issue and agreed that these documents could be taken off the table narrowing the scope of the review to 10 documents, some in their entirety and the severed portions of others. The CAS then disclosed documents not previously released to the applicant that consisted of the entire "computer file", in addition to the most of the 10 records already mentioned. At the end of the day, the CAS confirmed for the mediator that the applicant had been granted access to the entire foster parent file with the exception of small severances to 2 records. The applicant was satisfied and the file closed.

STAFF OF REVIEW OFFICE:

Darce Fardy	Review Officer
Susan Woolway	Mediator/Investigator
Matthew Young	Case Review Analyst

OFFICE EXPENSES: 2002

Salaries, wages and benefits	\$153,522
Rent	13,790
Shared support cost (Administrative support from UARB)	12,000
Repairs and Maintenance	7,199
Legal, audit and consulting	6,567
Offices supplies and services	5,323
Travel	4,767
Telephone	2,580
Equipment	2,485
Depreciation	2,436
Misc	1,330

STATISTICS

TABLE 1: ANNUAL REQUESTS FOR REVIEW OPENED:

	1995	1996	1997	1998	1999	2000	2001	2002
Municipal	0	0	0	0	4	14	18	14
Local	0	0	0	0	0	0	22	6
Provincial	54	86	0	122	112	111	114	93
Total	54	86	102	122	116	125	154	113

NOTES: Local public bodies were not subject to the Act before 2001 and municipal bodies were not subject to the Act before 1999. Local public bodies include universities, school boards and district health authorities.

Reviews of decisions made by municipal bodies declined 33% between 2001 and 2002.

Reviews of decisions made by local public bodies declined 73% between 2001 and 2002.

CHART 1:

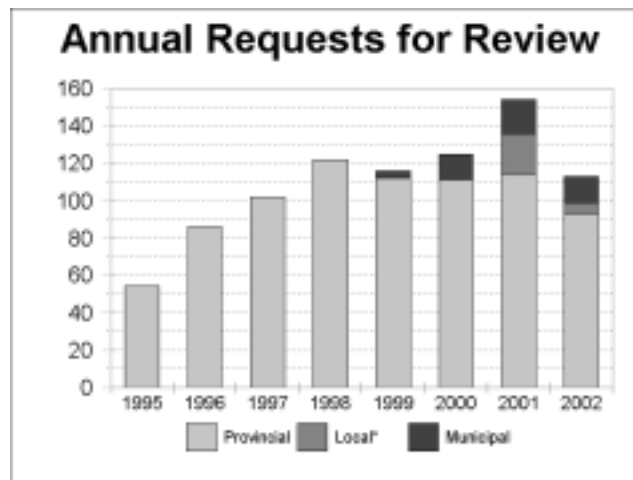


CHART 2:

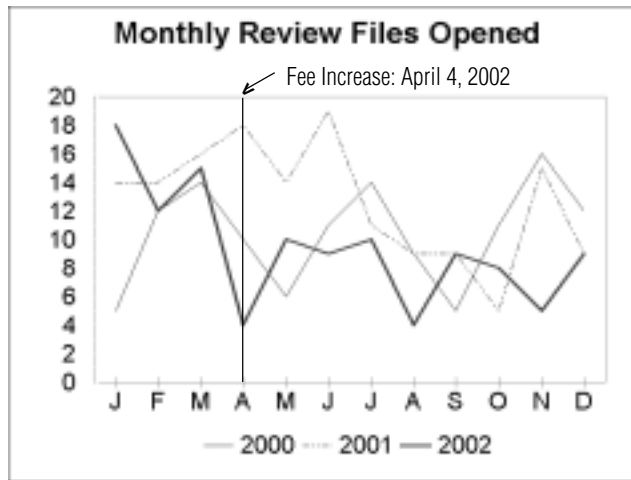


TABLE 2: 2002 QUARTERLY ACCESS REQUESTS TO THE PROVINCE

Q1	Q2	Q3	Q4
357	229	231	163

CHART 3:

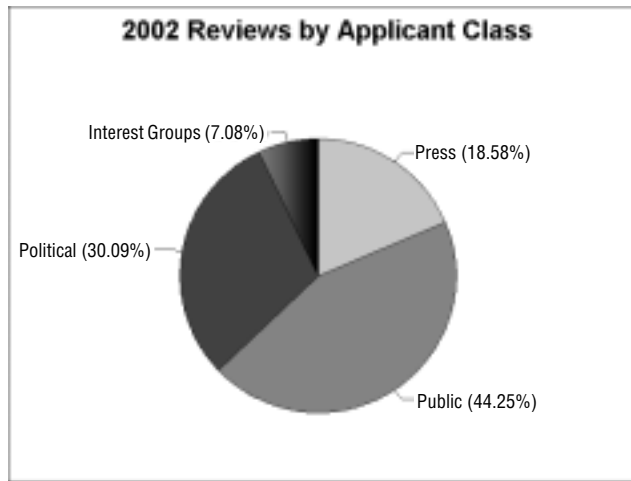


TABLE 3: 2002 REQUESTS FOR REVIEW OPENED BY APPLICANT GROUP (% OF TOTAL):

Press – Total	General Public – General Records	General Public – Personal Information*	General Public	Political	Interest Groups
21	50	25	25	34	8
(18.6)	(44.2)	(22.1)	(22.1)	(30.1)	(7.1)

*There are no fees charged for applications for personal information.

CHART 4:

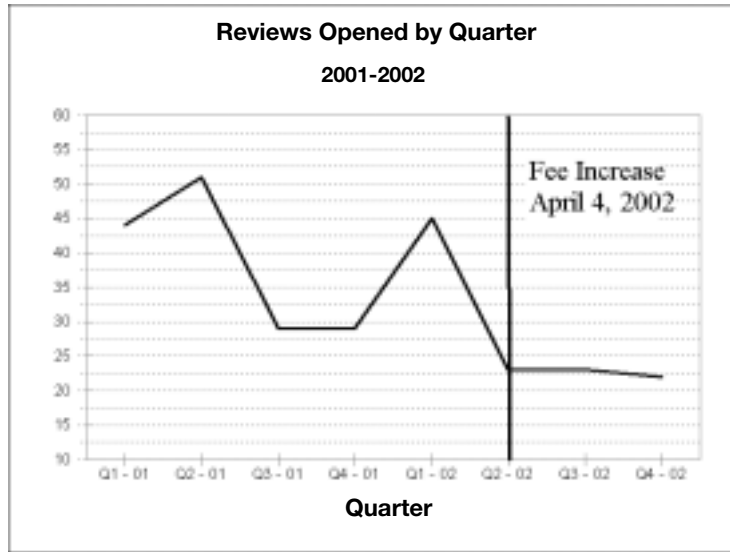


TABLE 4: AVERAGE NUMBER OF FILES OPENED PER MONTH BEFORE AND AFTER FEE INCREASE:

1996	1997	1998	1999	2000	2001	2002	2001 Before	2002 After
7.2	8.5	10.2	9.6	10.4	12.8	9.4	15	7.5

CHART 5:



CHART 6:

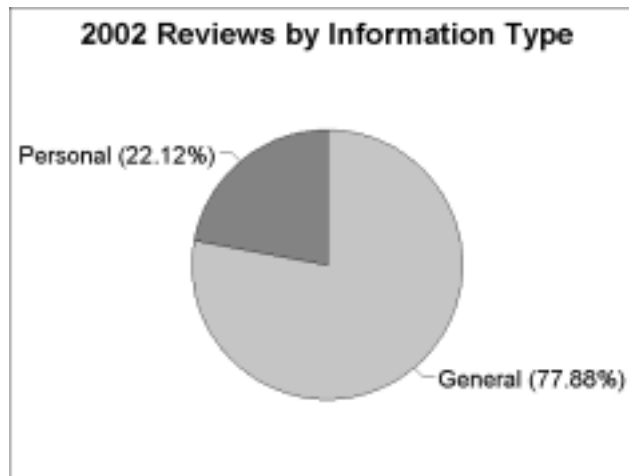
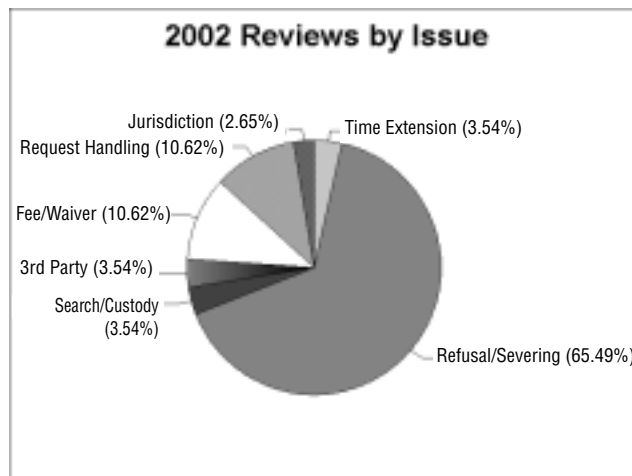


CHART 7:



MEDIATION RESULTS

TABLE 5: 2002 MEANS OF RESOLUTION OF FILES CLOSED (% OF TOTAL):

Resolved by Report	Resolved through Mediation	Withdrawn or Closed
71	34	10
(61.7)	(29.6)	(8.7)

CHART 8:

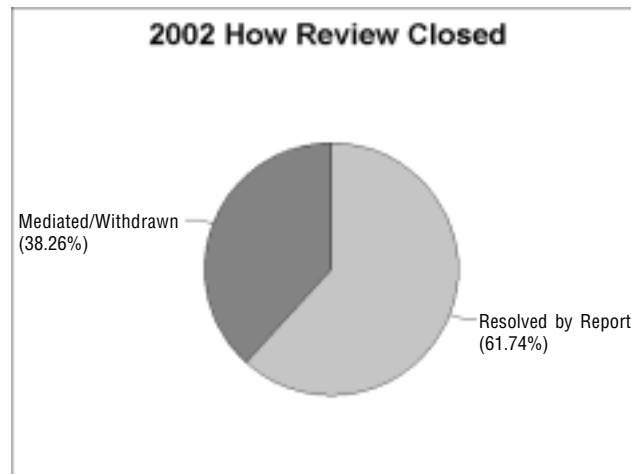


TABLE 6: 2002 MEDIATION SUCCESS RATES:

Public Body	Reviews	# Mediated	Mediation Rate
Justice	13	4	30.8
Environment & Labour	10	3	30
Economic Development	9	2	22
Transp. & Pub. Works	7	4	57.1
Community Services	6	1	16.7
Finance	6	1	16.7
Premier's Office	5	1	20
Education	5	0	0
Halifax Regional Police	4	1	25
SNSMR	4	3	75
Health	4	2	50
NSBI	4	0	0
Executive Council	4	0	0
Tourism & C	3	1	33.3
PPS	2	1	50
T & PB	2	1	50
HRM	2	1	50
Police Commission	2	1	50
Natural Resources	1	1	100
Public Service Commission	1	0	0
Gaming Corporation	1	1	100
CBRM	1	1	100
Kentville	1	0	0

Public Body	Reviews	# Mediated	Mediation Rate
Stellerton	1	1	100
Petroleum Directorate	1	0	0
UCCB	1	0	0
SYSCO	1	0	0
SFXU	1	0	0
SMU	1	1	100
Springhill	1	0	0
Colchester DHA	1	0	0
South Shore Health	1	0	0
Amherst Police	1	0	0
HRSB	1	0	0
AVRSB	1	1	100
CBVRSB	1	0	0
Chignecto-Central RSB	1	0	0
Children’s Aid of Colchester	1	1	100
EMO	1	0	0
FCS Lunenburg County	1	0	0
New Glasgow	1	0	0

REPORT RESULTS

TABLE 7: 2002 CONCLUSIONS OF THE REVIEW OFFICER (% OF TOTAL):

Agree with Public Body:	Disagree with Public Body:
29	42
(40.8)	(59.2)

TABLE 8: 2002 PUBLIC BODY DECISIONS (% OF TOTAL):

Recommendations Accepted:	19	(45.2)
Partial Acceptance:	6	(14.3)
Recommendations Rejected:	12	(28.6)
No Response Required:	4	(9.5)
Response Outstanding:	1	(2.4)

TABLE 9: 2002 PUBLIC BODY APPLICATIONS AND REVIEWS:

Public Body	Applications	Reviews
<i>Provincial</i>		
Environment & Labour	276	9
Justice	149	11
Health	92	6
Community Services	91	7
Public Prosecution Service	45	2
Transportation & Public Works	43	6
Education	37	4
Economic Development	32	9
Natural Resources	28	3
Service Nova Scotia & Municipal Relations	26	4
Premier's Office	22	4
Finance	19	4
Tourism & Culture	16	4
Executive Council	16	4
Nova Scotia Business Inc.	15	4
Treasury & Policy Board	15	3
Department of Energy	15	1
Agriculture & Fisheries	12	0
Public Service Commission	10	0
Human Rights Commission	6	1
Communications Nova Scotia	5	0
Nova Scotia Liquor Corporation	5	0
Intergovernmental Affairs	4	1
Sport & Recreation Commission	3	0
Nova Scotia Community College	3	0
Sydney Steel Company	2	1
Emergency Measures Organization	2	0
Nova Scotia Legal Aid Commission	2	0
Family and Children's Services of Lunenburg	2	1
Archives & Records Management	2	0
Workers' Compensation Board	2	0
Gaming Corporation	1	1
Nova Scotia Gaming Corporation	1	0
Technology and Science Secretariat	1	0
Police Commission	0	1

Public Body	Applications	Reviews
Securities Commission	0	0
Utility & Review Board	0	0
Workers' Compensation Appeals Tribunal	0	0
Halifax-Dartmouth Bridge Commission	0	0
Nova Scotia Boxing Authority	0	0
World Trade and Convention Centre	0	0
Aboriginal Affairs	0	0
Aboriginal Affairs	0	0
Ombudsman's Office	0	0
Family and Children's Services of Shelburne	n/a	1
South West Shore Development Authority	n/a	1
<i>Municipal</i>		
Halifax Regional Police	45	5
Halifax Regional Municipality	19	2
Town of Kentville	4	1
Town of Trenton	3	0
Municipality of the County of Pictou	2	0
Halifax Regional Water Commission	1	0
Municipality of the District of Guysborough	1	0
Municipality of the County of Kings	1	0
Municipality of the District of Lunenburg	1	1
Town of Antigonish	1	0
Town of Parrsboro	1	0
Municipality of the County of Antigonish	0	0
Municipality of the District of Barrington	0	0
Municipality of the District of Clare	0	0
Municipality of the District of Colchester	0	0
Municipality of the District of Hants West	0	0
Municipality of the County of Inverness	0	0
Municipality of the District of Shelburne	0	0
Municipality of the District of St. Mary's	0	0
Municipality of the County of Victoria	0	0
Municipality of the District of Yarmouth	0	0
Town of Berwick	0	0
Town of Bridgetown	0	0
Town of Hantsport	0	0
Town of Pictou	0	0

Public Body	Applications	Reviews
Town of Port Hawkesbury	0	0
Town of Shelburne	0	0
Town of Windsor	0	0
Village of Westport	0	0
Amherst Police	0	1
Town of Stellarton	n/a	1
Town of New Glasgow	n/a	1
Town of Springhill	n/a	1
Cape Breton Regional Municipality	n/a	1
<i>Local</i>		
Southwest / Tri-County School Board	9	0
Capital District Health Authority	9	0
Halifax Regional School Board	8	1
South Shore District Health Authority	7	1
Dalhousie University	6	1
Chignecto Central Regional School Board	6	1
Acadia University	4	0
Saint Francis Xavier University	3	0
Cumberland Health Authority	3	0
Annapolis Valley Regional School Board	3	0
University College of Cape Breton	2	1
Saint Mary's University	2	1
Nova Scotia Agricultural College	2	0
Cape Breton-Victoria Regional School Board	2	0
Southwest Nova District Health Authority	2	0
Colchester East Hants Health Authority	1	0
Pictou County District Health Authority	1	0
Strait Regional School Board	1	0
Conseil Scolaire Acadien Provincial	1	0
South Shore District School Board	1	0
Mount Saint Vincent University	0	0
Nova Scotia College of Art & Design	0	0
Atlantic School of Theology	0	0
University of King's College	0	0
Universite Sainte-Anne	0	0

FOURTH QUARTER 2001 SUPPLEMENT

TABLE 10: 2001 (Q4) REQUESTS FOR REVIEW OPENED BY APPLICANT GROUP (% OF TOTAL):

Press	General Public	Political	Interest Groups
12	13	4	0
41.4	44.8	13.8	0

TABLE 11: 2001 (Q4) REQUESTS FOR REVIEW OPENED BY ACT (% OF TOTAL):

Municipal Government Act	FOIPOP Act
4	25
13.8	86.2

TABLE 12: 2001 (Q4) REQUESTS FOR REVIEW OPENED BY INFORMATION TYPE (% OF TOTAL):

General Information	Personal Information
20	9
69	31

TABLE 13: 2001 (Q4) REQUESTS FOR REVIEW OPENED BY ISSUE (% OF TOTAL):

Time Extension:	4	13.8
Refusal to disclose/severing:	20	69
Adequate search/no records exist/custody & control:	1	3.4
3rd Party Review:	2	6.9
Fee Waiver:	1	3.4
No response in 30 days/Handling of Request:	1	3.4
Jurisdiction:	0	0