REPORT **FI-02-103**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision by the **DEPARTMENT OF NATURAL RESOURCES** to deny access to documents related to a mining company.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **February 26th, 2003**

ISSUE: Can the documents at issue be denied in accordance with **Sections 20** and **21** which protect the interests of third parties?

In a Request for Review under the **Freedom of Information and Protection of Privacy Act** (FOIPOP), dated November 3, 2002, the Applicant asked that I recommend to the Department of Natural Resources (the Department) that it disclose "the monetary value and form of the performance bond" posted with the Department by a coal mining company.

The Department received an application for access to:

1. A copy of original and annual mining plans of the mining company since permit approval;
2. A copy of "Form 15" submitted by the company as required by the Department;
3. The monetary value and form of the Performance Bond posted with the Department as a requirement of permit approval;

4. Copies of written notification from the company to the Department regarding suspension of the mine operations; and

5. Copies of written notification from the Department to the company regarding new regulations or changes in permit requirements since the original mining permit was issued.

In its response to the Applicant, the Department denied Parts 1 and 2 of the Application because this **Act** did not apply to that information. It cited Sections 150(1) and 175(1) of the *Mineral Resources Act* (the M.R.A.) which, according to **Section 4A(1) and (2)** of the **Freedom of Information and Protection of Privacy Act**, overrides the FOIPOP.Act.

> **150 (1)** Subject to this Section, information or documentation provided for the purpose of this Act or any regulation made pursuant to this Act, whether or not such information or documentation is required to be provided pursuant to this Act or any regulation made thereunder, is privileged and shall not knowingly be disclosed without the consent in writing of the person who provided it except for the purposes of the administration or enforcement of this Act for the purposes of legal proceedings relating to such administration or enforcement.

> **175 (1)** Except as otherwise provided in this Act and the regulations, all feasibility studies, financial data, mine and mill design studies and plans and equipment specifications in respect of a mine, shall remain confidential for the life of the relevant mining lease or permit, as the case may be.

With respect to part 3, the Department said the M.R.A. does not have a requirement for performance bonds for permit approval. However, it did identify a reclamation bond and disclosed this document in part, citing mandatory exemptions under **Sections 20** and **21** of the **Act**.

With respect to Part 4, the Department advised the Applicant that it had written documentation from the company that it was in non-production in the last quarter of 2000. However, it said that this notice was received in the form of Mineral Royalties Payable forms which are confidential under the M.R.A..

The Department produced one document related to part 5 and provided it in full to the Applicant.

The Applicant, in her submission, said that although the company agreed to progressive rehabilitation of the site of the mine when they signed the permit with the Department of Environment and Labour, no remediation has occurred since operations ceased. She wants to be satisfied that the "reclamation bond" is sufficient to pay for remediation.

During mediation, the issue was reduced to the severing of two documents, a "Quarry Permit Bond" and "Continuation Certificate". The Applicant was provided with both documents in severed form. In its decision letter to the Applicant the Department cited only the exemptions under Sections 20 and 21.

Section 20 protects a third party from an unreasonable invasion of personal privacy. Subsection 20(2) provides a list of circumstances to consider and subsections 20(3) and 20(4) provide a list of the kinds of personal information which, if disclosed, would or would not constitute an unreasonable invasion of personal privacy.

Section 21 protects against the disclosure of non-personal confidential information if it contains trade secrets or technical or financial information of a third party, which was provided

in confidence when it can be proven that disclosure could reasonably be expected to do significant harm to the third party's interests.

I have seen no evidence that the third party was notified of this application even though **Section 22** requires it. However, during mediation the third party made it clear it would not consent to the disclosure of the "Continuation Certificate" or the "Quarry Permit".

Conclusions:

In its letter of decision to an Applicant a public body is required to cite all of the reasons it used to deny information in whole or in part. Although it cited **Section 4A(2)(k)** of this **Act** on other parts of the application, it did not cite it on Part 3. According to Section 4A(2)(k), Section 175(1) of the M.R.A. overrides the provisions of this **Act**. In my view I have no choice but to conclude that since the Department cited s.175(1) on other parts of the application in its decision letter, it decided that it did not apply to part 3.

A public body may revise its reasons for making a decision within a reasonable period of time after its initial decision, but, in this case, we have no evidence that the Applicant was informed of revision. Consequently I feel it would be unfair to the Applicant to consider section 4A(2)(k) in this case.

The Applicant has expressed no interest in any personal information found in the documents. Consequently, I need only consider those portions severed under s.21. S.21 provides a three-way test and the burden of proof is on the Department to prove harm to the third party.

The Department must prove that the two documents contain trade secrets or commercial, financial or technical information; that this information was provided in confidence and; that disclosing the documents could reasonably be expected to:

- harm significantly the competitive position of the third party or interfere significantly with its negotiating position;
- result in similar information no longer being supplied to the public body; or
- result in undue loss or gain to any person or organization.

I agree with the Department that the documents contain financial information. I also accept the argument that, given s.175(1) of the M.R.A., the third party had a reasonable expectation that information in the documents would be held in confidence.

While addressing the "harm" part of the three-way test, I spoke with the third party, which argued that, because his company is negotiating with a contractor to work on the site, revealing the amount of the bond would put the company at a disadvantage and "could reasonably be expected to ...interfere significantly with its negotiating position".

I find that argument convincing and consequently, I accept the decision of the Department.

Dated at Halifax, Nova Scotia this 26th day of February, 2003.

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Darce Fardy, Review Officer