

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

A REQUEST FOR REVIEW of a decision of **TREASURY AND POLICY BOARD** to deny access to some information respecting a Government restructuring fund.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **March 12th, 2003**

ISSUE: Whether access can be denied under Section 12(1) (harm to intergovernmental relations) and Section 17(1)(e) (harm to the financial and economic interests of the Government).

In a Request for Review, in accordance with the **Freedom of Information and Protection of Privacy Act** dated December 9th, 2002, the Applicant asked that I recommend to the Treasury and Policy Board (the Board) that it disclose all of the information requested.

Nature of the Application

The Applicant had asked for “an itemized list for all things filed against the restructuring fund”. After discussions with the Board the Applicant provided a more specific request:

Part 1 “The total cost of the restructuring fund, broken out by each of the major cost centres from August 1999 to the present (the date of the application):

- (i) Workforce Adjustment
- (ii) Provision/Contract Negotiation
- (iii) Wage/Fringe Benefit Adjustment
- (iv) Business Process ReEngineering
- (v) Human Resources Strategy

(vi) Unallocated Recoveries

Part 2 The 'statistical order' of the costs charged to three cost centres from August 1999 to the present, namely:

- a) Business Process ReEngineering;
- b) Human Resources Strategy; and
- c) Unallocated Recoveries".

Exemptions claimed

In its letter of decision to the Applicant the Board provided part of the information sought but denied the remainder, citing exemptions under **Section 12(1)(a)(ii)** and **Section 17(1)(e)**.

S.12(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:

(ii) a municipal unit or a school board.

S.17(1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:

(e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

The financial figures for each line item fall under five columns on the tables provided by the Board to the Review Office:

Actual: the actual amount incurred up to the end of the reporting period.

Commitment: the amount incurred as payable, but not actually paid in the reporting period (There are no figures in this column).

Assigned: This is the sum of the “Actual” and the “Commitment”.

Plan: This column reveals an estimate for each item. The total only is provided when the Annual Budget is tabled in the Legislature.

Available: The figures in this column reveal whether the amounts are on budget.

During mediation by the Review Office the Applicant confirmed she was not interested in pursuing any figures found in the Provision/Contract Negotiations cost centre so the financial figures attributed to this cost centre are not an issue in this Review.

In further discussions with the Applicant she confirmed she was looking for the *actual* cost of each centre found in the first column of the tables for the years 1999, 2000, 2001 and 2002. The Applicant is satisfied with the information she received for 1999.

The information now in dispute includes the actual cost of:

- the Human Resources Strategy and its components (2000, 2001 and 2002);
- the Kaufman Report (2001);
- the Campaign for Fairness (2001-2002);
- the 1986 Accord Review (2002);
- Workforce Adjustment (2002); and
- the total Restructuring Costs (2000-2002).

The Board's submission:

The Human Resources Strategy

The components of the Human Resources Strategy include a reclassification review of all positions within the civil service. The figures show the budgeted amount of money set aside for three years to cover the costs of the reclassification. As it happened, no decisions were made during that period. The amounts were never made public and the Board believes disclosing them would interfere with its negotiating position in collective bargaining.

The Kaufman Report

The Kaufman Report was issued following an investigation into the Government's handling of accusations made against employees of youth homes. The figures attached to this heading reflect the Government's budget for, among other things, compensating employees. Negotiations on compensation are continuing and revealing the amounts set aside for this would interfere with the Government's negotiating position.

The Campaign for Fairness and the 1986 Accord

The Board also defended withholding the budget information for two Government activities: the "Campaign for Fairness" and the "1986 Accord Review". The "Campaign for Fairness" is a Government project aimed at seeking a greater share of the revenues from offshore oil and gas resources. The "1986 Accord" also had to do with offshore oil and gas revenues. The Board said that disclosing information about the "Campaign" and the "Accord" would reveal negotiating strategies and the names of the people or groups the Government was dealing with in constructing the Campaign. Disclosure, it said, "could harm negotiations with the Federal Government and other Provinces of Canada".

Workforce adjustment - 2002

It is the Board's view that disclosing documents related to Workforce Adjustment, would put the Province at a disadvantage during collective bargaining. Although a contract agreement has been reached with the Nova Scotia Government Employees Union it is still negotiating with other unions.

The total Restructuring cost

The Board believes that disclosing this amount would allow readers, by subtracting the amounts revealed from those withheld, to determine the amounts withheld.

Conclusions:

In my view the pertinent questions to be asked are, could these figures, if disclosed:

(a) reasonably be expected to harm the conduct by the Government of Nova Scotia of relations between the Government and a municipality or school board; or

(b) reasonably be expected to harm the financial or economic interests of Nova Scotia because the information is about negotiations carried on by or for the Government of Nova Scotia?

Section 45 of the **Act** places the onus on the Board to prove that disclosing the severed information would harm the financial and economic interests of the Government; and harm its relations with municipalities or school boards.

Public bodies making decisions on access should first refer to **Section 2** which gives the purpose of the **Act**:

to ensure that public bodies are fully accountable to the public by giving the public a right of access to records, with limited exceptions in order to facilitate informed public participation in

policy formulation, to ensure fairness in government decision making and to permit the airing and reconciliation of divergent views.

The Nova Scotia Supreme Court addressed “harm to government” in *Chesal v. Nova Scotia (Attorney General)*, 2003 NSSC 010. Justice Coughlin repeated the admonition found in a Nova Scotia Court of Appeal ruling, *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288 (C.A.), that this Act be interpreted broadly, and said “...I find the phrase in the Act ‘could reasonably be expected to harm’ is to be read ‘could reasonably be expected to result in probable harm’”. Justice Coughlin also cited the Federal Court of Appeal which concluded that in proving “harm” there must be more than “the mere possibility of foreseeable damage, as opposed to its probability” (*Canada Packers v. Canada (Minister of Agriculture) et al.* (1988), 87 N.R. 81).

There is no doubt that the Courts expect a public body to come up with “clear and convincing” evidence that harm will probably follow the disclosure of the withheld information.

In its submissions, written and oral, the Board did not address the matter of harm to its relations with municipalities or school boards. I have concluded, with respect to s.12(1)(a)(ii), that although the Board may want to keep some of these financial figures from municipalities and school boards, I am not convinced there is evidence that disclosure could reasonably be expected to harm relations between the government and municipalities and school boards.

Although the Board did not cite s.12(1)(a)(i) in its letter of decision to the Applicant it referred to it in its submission to the Review. I have seen no convincing evidence that disclosing

any of the figures found in the records could reasonably be expected to harm the Government's conduct of its relations with the Federal Government.

In my view, the Board's case rests solely on s.17(1).

I am satisfied that the Board has used its discretion and has provided convincing evidence that s.17(1) supports the Board's decision to deny access to the amounts under Human Resources Strategy. I disagree with the Board that the figures reveal information about "negotiations carried on by or for" the Government, this does not, to use the words of s.17(1) restrict "the generality of the foregoing".

I am of the same opinion with respect to the figures under "Kaufman Report".

With respect to the "Campaign for Fairness" it is my view that disclosing the financial figures would not reveal strategies, names or places visited, as the Board alleges. In my Review of a decision of another public body to deny access to costs of the "Campaign" I concluded there was no proof of probable harm to disclosure of this information and recommended it be disclosed (see FI-02-112). I have reached the same conclusion this time.

I have also reached the same conclusion with respect to the "1986 Accord". In my view the Board has not successfully borne the burden of proving the harm alleged in disclosing the financial figures of both these cost units.

In my view, the withholding of the Workforce Adjustment amounts for 2002 is supported by s.17(1) because negotiations must still be completed with some of the unions.

I am satisfied that s.17(1) supports denying the total Restructuring figures up to but not including the year 2002. However, so many other figures have been denied in the "Actual" column of that year that a reader would not be able to deduce the cost of any single category by

learning the total Restructuring costs. It would, in my view, do no more harm than disclosing the total Restructuring costs for the year 1999, which the Board did. In my view the Board should reflect on the purpose of the **Act** and reveal the total restructuring cost for 2002.

Recommendation:

That the Board disclose in addition to what it has already disclosed:

- the financial figures attached to the “Campaign for Fairness” and the “1986 Accord”; and
- the total Restructuring cost for the year 2002.

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Section 40 requires the Board to make a decision on this recommendation within thirty days and to notify the Applicant and the Review Officer, in writing, of that decision.

Dated at Halifax, Nova Scotia this 12th day of March, 2003.

Darce Fardy, Review Officer