REPORT **FI-02-112**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **OFFICE OF INTERGOVERNMENTAL AFFAIRS** to refuse to reveal the costs of a Government program called "Campaign for Fairness".

REVIEW OFFICER: Darce Fardy

REPORT DATE: **February 7th, 2003**

ISSUE: Whether the disclosure of the costs of the program would reasonably be expected to harm relations between the Province and the Federal Government; and whether disclosure could reasonably be expected to harm the financial and economic interests of the Province.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated December 18, 2002, the Applicant asked that I recommend to the Office of Intergovernmental Affairs (the Office) that it disclose the documents requested.

The Applicant asked for an itemized list of the costs, since 1999 associated with the Campaign for Fairness, a program designed to seek a greater share for the Province of the revenues from offshore oil and gas resources. The Applicant said she would accept the total cost immediately if producing an itemized list would be delayed.

In its response the Office said simply:

> Access to the records requested is refused for the following reasons: Section 12(1)(a)(i) and Section 17(1)(e) of the Freedom of Information and Protection of Privacy Act.
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> **Section 17(1)(e)** reads:
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> 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.
>
> **Section 12(1)(a)(i)** reads:
>
> 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:
>
> > (i) The Government of Canada or a province of Canada,

In its submission to the Review, the Office, in support of s.17(1), said that the records would:

> ...reveal information about negotiations being carried on with the Government of Canada....Disclosing the purpose and amounts of the requested expenditures would reveal the nature of our effort and commitment, and elements of our negotiating strategy, which in turn could place a successful outcome in jeopardy.

Disclosure was denied under s.12(1) because, according to the Office's submission, disclosure would disrupt a productive working relationship which would be damaged if publicity was given to the Provincial expenditures.

During mediation, the Applicant narrowed her application to costs incurred from 2000 to 2003. 17 documents are relevant to the narrowed application.

Section 45(1) lays the burden of proof on a public body and requires a public body to provide facts to support a claim that it is reasonable to expect harm.

In accordance with **Section 38** I have been provided with copies of the records being denied the Applicant.

Conclusions:

With respect to s.17(1)(e) the Office has concluded that the costs attached to negotiations would reveal information about the negotiations. In my view this is not a reasonable conclusion to reach. This exemption is designed to allow a public body to refuse to disclose information that, if disclosed, would put it at some disadvantage in its negotiations.

With respect to s.12(1), a recent ruling of the Nova Scotia Supreme Court (*Chesal v. Attorney General of Nova Scotia*, 2003 NSSC 010) dealt at length with this exemption. Justice Coughlin agreed with the conclusions drawn by the Federal Court of Appeal (in *Canada Packers Inc. v. Canada (Minister of Agriculture) et. al.* (1988), 87 N.R. 81) that in proving 'harm' there must be more than "the mere possibility of foreseeable damage, as opposed to its probability". He also noted the direction of *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288 (C.A.) that the **Act** be interpreted broadly and concluded: "... I find the phrase in the *Act* 'could reasonably be expected to harm' is to be read as 'could reasonably be expected to result in probable harm'".

The Government of British Columbia's Access to Information Manual says: "(T)here must be objective grounds to believe that disclosure would likely result in the harm contemplated by this exception (exemption)".

I've seen no evidence that costs to the Government of carrying out the Campaign, could "reasonably be expected" to result in "probable harm" to Nova Scotia's financial or economic interests or its relations with the Federal Government.

Recommendation:

That the Office disclose to the Applicant from the records provided to the Review Officer:

- pages 77 to 94, and pages 111 and112.

...

Section 40 of the **Act** requires the Office to make a decision on this recommendation within 30 days of receiving a copy of this Report and to notify the Applicant and the Review Officer, in writing, of that decision.

NOTE:

The Office's response to this application and its failure to attempt to show proof of harm is disappointing.

The Nova Scotia Supreme Court expects public bodies to give reasons for denying documents beyond the mere citing of exemptions. In *McCormack v. Nova Scotia (Attorney General)*

et al., (1993) N.S.J. No 625, Justice Edwards said public bodies should "detail for the applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough".

I believe it is incumbent on public bodies to ensure they are made aware of the views of the Court and to follow its instructions.

Dated at Halifax, Nova Scotia this 7th day of February, 2003.

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Darce Fardy, Review Officer