REPORT **FI-02-31**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **OFFICE OF ECONOMIC DEVELOPMENT** to sever documents released to an applicant looking for information related to a Government decision to provide a payroll tax rebate to Sobeys Inc.

REVIEW OFFICER:	Darce Fardy
REPORT DATE:	July 8, 2002
ISSUE:	Whether exemptions under Sections 13, 14, 16, 20 and 21 support the decision of the Office of Economic Development to sever documents related to the government's decision to provide a payroll tax rebate to Sobey's Inc.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated March 5, 2002, the Applicant asked that I review the decision of the Office of Economic Development (the OED) to sever documents related to the Government's decision to provide a payroll tax rebate to Sobeys Inc., the Nova Scotia-based groceries distributor.

The Application went to the Department of Economic Development (now the OED). In its reply, the Applicant was told that access to the requested records "has been substantially granted."

Among the records were the Order in Council approving the rebate with copies of the Report and Recommendation to the Executive Council (R & R), Schedule "A" which contains

the terms and conditions of the rebate, a page described as a "Briefing Note" and a Communications Plan, all of which went before Cabinet as it considered the tax rebate proposal. These documents were severed in accordance with **s. 5(2)** of the **Act**. The OED claims exemptions found in **ss. 13(1)**, **14(1)** and **21(1)** of the **Act.** Section 13(1) allows a public body to deny access to documents which reveal the "substance of deliberations" of the Executive Council. Section 14(1) allows a public body to deny access to documents containing advice to a minister. Section 21(1) protects the interests of third parties. Specifically, the OED cited s.21(1)(a)(ii), (b) and (c)(i), (ii) and (iii).

Other records provided in severed form include a letter from the OED to Sobeys with a Schedule "A," Terms and Conditions, attached, and correspondence involving the OED, the Nova Scotia Business Development Corporation and Sobeys. These documents were severed under **ss. 20(1), 21(1)** and **16**. Section 20 protects against the unreasonable invasion of an individual's personal privacy and s.16 allows a public body to refuse to disclose documents which fall under solicitor-client privilege.

The Applicant, in his representation to the Review, believes the OED severed more of the R & R than was necessary and that some of the severing cannot be supported by s.13(1) or s.14(1). He questions whether or not the OED is withholding background information which should be disclosed in accordance with both s.13(2) and 14(2).

With respect to the severing of the names of Sobeys officials in some of the documents, the Applicant does not accept the view that disclosure of the names of people negotiating with the government for public financial support can be described as an unreasonable invasion of the personal privacy of the individuals. "If these exclusions stand," he says, "how are

people to know if the province on any deal is talking to the right person, or to individuals whose role and relationships give rise to legitimate questions, such as conflict of interest."

The OED denied access to the Schedule "A" which was attached to the R & R because it went before the Executive Council for its deliberations. However, it provided the Applicant with a document titled Schedule "A" which had been attached to a letter to Sobeys and did not go before the Cabinet. The OED made a distinction between documents which went before Cabinet and similar documents which did not. The Schedule "A"attached to the letter was severed of most of the financial information because the OED believes, in accordance with s.21(1), that, to quote from the OED's representation to the Review, "releasing the information has the potential to harm the competitive position not only of a third party but more significantly it impairs the ability of the government to negotiate in good faith with third parties in other contractual relationships." The OED said it was clear that if a negotiating party has information about what a competitor has received through negotiations with the government, the position of the government would be compromised.

With respect to the Briefing Note, the OED said it released the background section of the notes even though, like the rest of the Briefing Note, it was exempt from disclosure under s.14(1). The OED argued that because the Briefing Note was prepared for the Minister in order for him to brief the Cabinet, that the Note could have been denied under s.13(1) as well.

With respect to the Communications Plan, the OED uses the same arguments it used under ss.13(1) and 14(1) in denying or severing other documents.

It may be helpful to review what was disclosed to the Applicant:

- The Order in Council, a public document;

- a Report and Recommendations to the Executive Council severed under s.13(1) and s.14(1);
- the "background section" of a Briefing Note under ss.13(1) and 14(1);
- a letter from the Deputy Minister to the Sobeys Group, dated September 13, 2000, approving the payroll rebate with the name of the Sobeys official severed under s.20;
- a Schedule "A" which was attached to the above-noted letter with all the financial figures severed under s.21(1), except for the $3.5 million in government assistance;
- an e-mail dated 11/15/00 from one government official to another with the names of Sobeys officials severed under s.20;
- an e-mail dated 1/24/01 from one government official to another with a payroll figure severed under s.21(1);
- a letter dated February 2, 2001 from a Sobeys official to the Nova Scotia Business Development Corporation with severing under s.21(1);
- a letter dated February 2, 2001, from Sobeys officials to the company's auditor with a paragraph deleted under s.21(1);
- a memo to the Minister from a department official, dated February 12, 2001, with severing under ss.16 and 21(1);
- a letter dated February 16, 2001 from the OED to Sobeys confirming the administration of the payroll rebate agreement with the identity of the Sobeys official severed under s.20;

- a letter dated February 21, 2001, from Sobeys to the Nova Scotia Business Development Corporation with respect to the payroll rebate claim with the name of the Sobey official severed under s.20; and
- four documents related to the first payment from the OED to Sobeys for $900,000.00.

Although much of the financial information was denied under s.21(1) after objections were received from the third party, the burden "is on the head of the public body to prove that the Applicant has no right of access" to the information denied: s.45(1). The OED's arguments must pass the three-step test attached to s.21(1). It must offer proof of its assertion that releasing the severed portions would reveal "commercial, financial, labour relations, scientific, or technical information of a third party": s.21(1)(a)(ii) and that the severed information was *"supplied* by the third party, explicitly or implicitly, in confidence":s.21(1)(b)] and finally, that disclosing the information would *reasonably be expected to*, by s.21(1)(c):

> or interfere significantly with the negotiating position of the third party;
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or
>
> (iii) result in undue financial loss or gain to any person or organization [emphasis added].

These are the sub-sections of s.21(1) claimed by the OED in its decision letter to the Applicant.

On receiving the application the OED informed the third party of its contents and

provided copies of four relevant documents for the third party's reaction. The third party objected to the disclosure of two of the documents and the OED agreed.

Conclusions:

In accordance with **s.38** I have been provided with documents related to this application, including representations the third party made to the OED expressing its objections to the disclosure of some of the information in the documents, particularly the financial figures. While the first two parts of the three-part s.21 test have been met it is my view that no convincing evidence has been offered to support the claim of significant harm to the third party's interests. I contacted the third party which said it had made its case to the OED.

It is my view that the OED, recognizing that it, and not the third party, makes the decision on disclosure and that it must provide proof of harm, should have challenged the third party to be much more specific in stating its objections than it was. The Court of Appeal of Ontario has ruled that "(i)f the evidence lacks detail and is unconvincing, it failed to satisfy the onus and the information would have to be disclosed: *Workers' Compensation Board v. Mitchinson* (1989-09-03) c22695.

The Federal Court of Canada ruled that "evidence of harm must be detailed, convincing and describe a direct causation between disclosure and harm. It must not merely provide grounds for speculation as to possible harm": *Sawbridge Indian Band v. Canada (Minister of Indian Affairs and Northern Development)* (1987) (F.T.R.) 48.

The Supreme Court of Nova Scotia said a review of the "harm of disclosure" subsections makes it clear that the legislature seeks evidence of more than the possibility of some

loss. Justice Kelly stressed the importance of the words *reasonably* and *significantly* as they are used in s.21(1): *Atlantic Highways Corp. v. Nova Scotia* (1997), 162 N.S.R. (2d) 27.

The British Columbia Government, in its Freedom of Information and Protection of Privacy Manual, addresses the matter of the application of s.21(1). (The B.C. Act uses the same language and the same section number as does Nova Scotia's). It says:

> A public body must be able to present detailed and convincing evidence of the facts that led to the expectation that harm would occur if the information were disclosed. There must be a link between the disclosure of specific information and the harm which is expected from release.
>
> It is not necessary to demonstrate that actual harm will result, or that actual harm resulted from a similar disclosure in the past, although such past experience could be part of the factual considerations upon which the expectation of harm is based.
>
> The third party's representations may or may not affect the finding of fact as to whether part or all of the requested record must be withheld under this exception.

Clearly disclosure must have more than the "potential to harm," to use the words of the OED.

One example of an unsupported claim is found in s.21(1)(c)(ii). The OED believes that disclosing information could result in third parties refusing to provide the government with information it needs. A third party seeking financial assistance is unlikely to be in a position to refuse to provide the government with information it requested to help it decide whether to provide the assistance. It is in the best interests of a company to provide the information.

It has been noted that the OED also argued that disclosing some of the denied information would harm the government's ability to negotiate future agreements with other third parties. However, that exemption is found in **s.17(1)** which the OED did not cite as an exemption in its letter to the Applicant in its representations to the Review. I will not address it here.

O'Connor v. Nova Scotia (2001) NSCA #132 must be considered with respect to s.13(2). The Supreme Court of Canada recently decided not to hear an appeal of this judgement. The Appeal Court ruled that if contents of a document meet the definition of "background information," found in **s.3(1)(a)**, and the conditions of s.13(2) apply, a document must be disclosed even if may reveal the "substance of deliberations" of the Executive Council.

S.13(2) reads: Subsection 13(1) does not apply to

(c) background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public;

(ii) the decision has been implemented, or

(iii) five or more years have passed since the decision was made or considered.

"Background information" is defined in s.3(1)(a) as, among other things, any factual material.

Finally I refer the OED to **s.2** of the **Act** which states in part:

2. The purpose of this Act is

> (a) to ensure that public bodies are fully accountable to the public by
>
> (i) giving the public a right of access to records,
>
> (b) to provide for the disclosure of all government information with necessary exemptions, that are limited and specific, in order to
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> (i) facilitate informed public participation in policy formulation,
>
> (ii) ensure fairness in government decision-making,
>
> (iii) permit the airing and reconciliation of divergent views.

The question the OED must ask itself is whether the information released will allow the public to draw informed conclusions on whether or not it supports the decision of the OED. In my view, the disbursement of public monies requires full accountability.

In *Atlantic Highways,* Justice Kelly commented on a statement I made in an earlier Review involving the same issue: FI-96-46. I had concluded that "a private company cannot expect to keep private the information contained in an agreement signed by the government most especially when public funds are involved." Justice Kelly said:

> I confess to some difficulty with this broad statement as there may be *rare* circumstances where it could be in the public interest to do so. For example if such a contract also involved other protected information of the **Act**, such as certain personal information. However, the general statement is valid in most circumstances as it reflects the right of citizens to be informed of the use of public funds (emphasis mine).

In *Atlantic Highways*, the Department of Transportation and Public Works apparently supported my view because it decided to disclose the signed agreement. The appeal to the Court was brought by *Atlantic Highways*.

In *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288 at pp. 292-293, the Nova Scotia Court of Appeal concluded that this **Act** "should be construed liberally in the light of its stated purpose. . . so that doubt ought to be resolved in favour of disclosure."

I have concluded that information revealing the conditions imposed by the OED on the payroll rebate should be disclosed. It is the only way, in my view, to allow for "informed public participation in policy formulation."

With respect to the other exemptions cited, I agree that the OED properly used its discretion when it denied information subject to solicitor client privilege (s.16).

With respect to s.20, I have concluded, after considering s.20(2)(a), that disclosing the names of the Sobeys officials is not "desirable for the purpose of subjecting the activities of the Government of Nova Scotia. . . to public scrutiny" and therefore would constitute an unreasonable invasion of privacy.

It is clear to me that s.14(1) should be applied only to documents containing advice, recommendations or draft regulations "developed by or for a public body or a minister." I don't understand why the OED cited it on the documents which went before the Executive Council. If s.13(1) were not upheld as an exemption on cabinet documents, it is unlikely s.14(1) would.

Recommendations:

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

(i) The last paragraph of page 3 of the R & R, starting with "The undersigned. . ." to the end of page 4;

(ii) from the Schedule "A" attached to the R & R, the Provincial funding amount under "Financing"at the top right of the front page; Sections (a), (b) and (c) of "PROJECT"; all three sections under "DISBURSEMENT" on pages 2, 3 and 4, including "Payment"; the section under "CONTINGENT CONDITIONS" with no severing; and the section under "UNDERLYING CONDITIONS";

(iii) from the "Briefing Note" the section under "ISSUE";

(iv) from the Communications Plan the section under "Audience" and the section under "Key Message(s) which has already been disclosed to another applicant;

(v) from the Schedule "A" attached to the letter of September 13, 2000: All of the sections under "PROJECT" and "CONTINGENT CONDITIONS";

(vi) from the e-mail of 1/24/01 the severed portion; and

(vii) from the Memo to the Minister, dated February 12, 2001, the figures on the second page.

Section 40(1) requires a public body to make a decision on these recommendations within 30 days of receiving them and to give written notice of the decision to the Review Officer and the persons who were sent a copy of the Report.

DATED July 8, 2002 in Halifax, Nova Scotia

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Darce Fardy, Review Officer