

**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 related to a Government payroll rebate to Sobeys Group Inc.

REVIEW OFFICER: Darce Fardy

REPORT DATE: June 10, 2002

ISSUE: Whether a decision to sever documents is supported by **Sections 13(1), 14(1) and 21(1)**.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated March 14, 2002, the Applicant asked that I review the decision of the Office of Economic Development (the OED) on his application.

The Applicant had asked for “all background documents presented to Cabinet regarding its 2000 decision to grant payroll tax rebates to Sobeys,” the Nova Scotia-based groceries distributor. The OED (formerly the Department of Economic Development) identified, as records subject to the application, the “Report and Recommendation to the Executive Council” and documents attached to it: the Schedule “A,” containing the recommended terms and conditions of the rebate, a ministerial Briefing Note and a Communications Plan. They were provided to the Applicant severed of information the OED claims is exempt under **sections 13(1) and 14(1)**.

Section 13(1) allows a public body to refuse to disclose information that would reveal the “substance of deliberations” of the Executive Council. Section 14(1) gives a public body

the discretion to deny access to documents containing advice or recommendations developed by or for a public body or a minister.

In its representation to the Review, the OED concedes the documents were “heavily edited” and said the editing is consistent with what it believes is the principle behind the s.13(1) and s.14(1) exemptions.

The OED argues that the Report and Recommendation to the Executive Council (the R & R) is exempt under both s.13(1), because it contains the substance of the cabinet’s deliberations, and under s.14(1) because “the members of Executive Council are also ministers of the government, hence the R & R is also advice to a minister or in this case ministers.”

Schedule “A” contains the recommended terms and conditions relating to the financial assistance provided to Sobeys. It’s the OED’s position that even though Schedule “A” was referred to in the Order in Council, which is a public document, and “at first blush would appear to make it a matter of public record,” it was not appended to the Order in Council and is therefore not a public document. The OED decided that access to all of Schedule “A,” with the exception of its title, could be denied under s.13(1). **Section 21(1)** is cited for a small portion of the document under a third party exemption. The OED did not refer to s.21 in its letter of decision of the Applicant but cited it for the first time in its representation to this Review.

The OED believes that the denial of the contents of Schedule “A” is supported not only by s.13(1) but also by s.21(1) because its disclosure would harm the interests of the third party. The OED is aware that a three-way test must be applied when s.21(1) is claimed. A document or part of a document denied under s.21(1) must contain trade secrets or financial, commercial or technical information of a third party; the information in the document must have been provided in confidence; and it must be shown that disclosure of the information could

reasonably be expected to harm significantly the third party's competitive position or interfere significantly with its negotiating position, or result in undue loss gain to a person or organization. The OED believes the three-way test has been met.

According to the OED argument, the Government required the third party to provide it with financial and commercial information and promised the information would be held in confidence. The OED explained that the approved tax rebate program allows for a range of reimbursement which is a matter of negotiation between parties and release of the actual figures could reasonably be expected to harm the competitive position of the third party and cause undue gain to another third party negotiating for a similar rebate.

Most of the Briefing Note was denied under s.14(1) because, in the OED's view, the notes contain advice to a minister. The Background section of the Briefing Note was disclosed even though the OED said it had the discretion to deny it under both s.14(1) and s.13(1).

The Communications Plan was also, admittedly, heavily edited and denied under s.13(1) and s.14(1). The OED had an additional argument for denying most of the Communications Plan: the facts are not "exact and therefore do not accurately reflect the transaction." It correctly points out there is no exemption in the **Act** for inaccurate information but believes disclosing inexact information would not be in the spirit of the **Act**.

The Applicant did not make a representation to the Review.

Conclusion:

I will not consider s.21(1) in this Review because I agree that s.13(1) stands as an exemption on Schedule "A" which went before the Executive Council as an attachment to the R & R.

With respect to s.13(1), the principle of cabinet confidentiality is respected in all access legislation in the country. However, the term “substance of deliberations” is open to interpretation. In my Report FI-02-24 I accepted *O’Connor v. Nova Scotia* (2001) NSCA #132 as the foremost authority on s.13. The Court of Appeal of Nova Scotia ruled that in order for a document to be considered part of the substance of deliberations the information in it should “permit the reader to draw accurate inferences about Cabinet deliberations.” Because the decision has been appealed to the Supreme Court of Canada, the OED has determined it is inappropriate to follow the *O’Connor* decision until the higher court is heard from.

An R & R to Cabinet would, by definition, contain the substance of deliberations of the Executive Council. However, s.13(1) does not apply to “background information” presenting explanations or analysis to the Executive Council which, according to s.13(2), must be disclosed if a decision has been implemented or made public. There is no section of the R & R headed “background information” but that doesn’t mean there is no background information in the document. “Background information” is defined in **section 3(1)(a)** as, among other things, “factual material.” In my view some of the denied information contains factual material and should be disclosed.

Briefing notes and communication plans provided to ministers by their communications advisers are designed to provide advice, which is protected from disclosure by s.14(1). The OED disclosed a section of the Briefing Note, headed “Background,” even though it believes it could have been denied. The section disclosed is headed “background” and it is obvious it is. Section 14(2) requires OED to disclose it. It is also my view that the section titled “Issue” is, in fact, background information, which is defined in s.3(1)(a)(i) as “any factual material.” The “Issue” section contains factual material and must be disclosed.

Only the subject of the Communications Plan and its individual headings were disclosed. This document was part of an earlier application and subsequent appeal from the same applicant. I made recommendations in my report, FI-02-40, which the OED has mostly accepted.

It is my view that the Briefing Notes and the Communications Plan should not be considered exempt under s.13(1). While these documents went before the Executive Council, I doubt they were used to assist the Cabinet in deciding whether to provide the tax rebate. These documents would be useful after the decision was made.

While the OED was processing this application it was also considering a second one related to the same subject matter. The second applicant was provided with a document attached to a letter to the third party which contained more information than this Applicant received. The OED said this Applicant was not provided with the document because he did not ask for it.

This **Act** imposes a positive duty on public bodies to assist applicants. **Section 7(1)(a)** expects a public body to “make every reasonable effort to assist the applicant . . . openly, accurately and completely.” Decisions on both applications, on the same matter, were passed to the two applicants on the same day. I believe it is reasonable to expect the OED to conclude, in this case, that although the Applicant did not specifically ask for the document given to the first applicant, it would be useful to him. A public body is expected to go beyond a narrow interpretation of an application. The **Act**, in my view, expected the OED to provide this Applicant with the same document provided to the other.

With almost all applications it is incumbent on public bodies to contact applicants to discuss their applications. It is part of their duty to assist an applicant and part of the attempt a FOIPOP Administrator should make to develop a working relationship with the applicant to define the nature and scope of the application. Some do this as a matter of practice. In this case I am told

this was not done, although five months passed between the time the application was received and a decision was made.

Public bodies should avoid technical interpretations of an **Act** that is designed to promote openness and accountability. They should make every attempt to meet the purpose of the **Act** found in **section 2** to ensure public bodies are fully accountable to the public to facilitate informed public participation in policy formulation. The response to this application did not, in my view, meet that expectation.

That being said, I have concluded that most of the denied information is appropriately severed in accordance with s.13(1) and s.14(1).

Recommendations:

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

- from the R & R, the first part of the first sentence of the “Summary” starting with “Authority . . . and ending with “. . . rebate”;
- from the Briefing Note, the section headed “Issue”; and
- the document referred to above which was provided to the second applicant.

DATED on June 10, 2002 in Halifax, Nova Scotia.

Darce Fardy, Review Officer