

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

A REQUEST FOR A REVIEW of a decision of **NOVA SCOTIA BUSINESS INC.** to refuse a request or a fee waiver.

REVIEW OFFICER: Darce Fardy

DATE: July 23, 2002

ISSUE: Whether Nova Scotia Business Inc. should have granted a request for a fee waiver on the grounds that the information sought in an application concerned matters of public interest.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated April 15, 2002, the Applicant asked me to review a three-part decision of Nova Scotia Business Inc. (NSBI):

1. NSBI's refusal to disclose the contract of its Chief Executive Officer;
2. its refusal to disclose the names of the employees whose salaries were disclosed; and
3. its refusal to waive fees.

During this Office's mediation process the contract and the employees' names were disclosed. The only issue to consider in this Review is the refusal to waive fees.

In his representation to the Review, the Applicant said he believed the matters raised in his application were ones of public interest and that, therefore, the information should

be disclosed at no cost. In his application to the NSBI, the Applicant asked for a fee waiver and raised three reasons why the waiver should be granted. The NSBI turned down the fee waiver request after considering the reasons: cannot afford to pay; it's a matter of public interest; and past practice. In his representation to the Review the Applicant argued only "public interest." NSBI expressed some concerns about the Review Office's decision to consider the Applicant's arguments on public interest when they were not argued in the application to the NSBI before it made its decision. I will discuss that later in this Review.

Section 11 of the **Act** allows a public body to charge fees for processing applications. Section 6 of the Regulations sets the fees that can be charged for locating a record, preparing the record for disclosure, shipping and handling the record and providing copies. The NSBI provided an itemized fee estimate as required. It amounted to \$105.00. The Applicant paid the fee and then appealed it to the Review Officer.

Subsection 11(7) allows a public body, on request, to excuse an applicant from paying all or part of the fee if, in the public body's opinion,

- (d) the applicant cannot afford the payment or for any other reason it is fair to excuse payment; or
- (e) the record relates to a matter of public interest, including the environment or public health or safety.

In his representation to the Review, the Applicant provided arguments to support his view that fees should be waived "in the public interest." He points to the amount of media attention that was given to the cost to establish the agency and its activities. This attention, he says, was driven by what he called "the expensive failures" of some government-supported businesses and projects

in the past. His final argument was that the government itself saw the creation of NSBI as worthy of public interest by the way it announced NSBI's birth. The Applicant's

arguments were passed on to the NSBI. They prompted a second representation.

NSBI referred to other reviews I have done where applicants claimed a fee waiver "in the public interest." In those reviews I listed factors to be considered when determining if a matter is one of public interest. The NSBI listed the factors and commented on each:

1. Does the subject matter relate directly to the environment or public health or safety?

The records sought are administrative records about salaries and contracts and do not relate to the environment, public health or safety.

2. Has the information been the subject of recent public debate?

The information sought was not the subject of significant or general public debate.

3. Would dissemination of the information (reasonably be expected to) yield a public benefit by disclosing an environmental concern or a public health or safety concern?

The subject matter is about wages and contracts, not about the environment or public health or safety.

4. Would dissemination of the information (reasonably be expected to) yield a public benefit by contributing meaningfully to the development of a public understanding of an important environmental or public health or safety issue?

The subject matter of the application was not about these issues.

5. Would dissemination of the information yield a public benefit by contributing to the public understanding of an important policy, law or service?

The subject matter was not about a policy, law or service.

6. Do the records disclose how the public body is allocating financial or other resources?

Yes, but this one factor by itself is insufficient to merit an automatic declaration of the matter being one of public interest. The accountability and transparency of NSBI's financial management is achieved when the annual proposed budget is debated in the legislature and the approved budget is made public. The information sought by the applicant is of limited public benefit.

NSBI concluded that, on balance, the records sought do not relate to a matter of public interest. It added media attention is by itself an insufficient test of public interest. It saw no value in the Applicant's argument that the government's attention-getting announcement of the establishment of NSBI was recognition that the matter is one of public interest.

Earlier in this Report reference was made to NSBI's concern that the Review Office entertained a representation from the Applicant containing arguments that he had not made to NSBI when he asked for the fee waiver.

"In the conduct of a review," said NSBI, "it must be recognized that the Head [of NSBI] did not have the benefit of these arguments from the Applicant when the matter was originally considered and decided by the Head." It quoted from a decision of the Alberta Information and Privacy Commissioner:

"... I am limited to reviewing the evidence and information that was before the Public Body at the time the public body made the decision. This means that although I have reviewed the Applicant's submission, I cannot base my decision on any new evidence or information that is included in the Applicant's submission" (Alberta Order 99-012).

NSBI said it expected I would agree with my colleague, and that my review of the

NSBI decision should be limited to the evidence and information that was before the public body when it made its decision.

Conclusions:

I will respond to the final point of the NSBI representation first. I must admit I have not heard this concern before.

The Applicant was a little careless initially in his arguments to the NSBI regarding the fee waiver and made an obvious mistake he quickly acknowledged. NSBI, in its decision, should have recognized a mistake was made and could have confirmed it in a telephone call to the Applicant. This would have spared the NSBI valuable time. But if the Applicant was careless, the NSBI was too strict, despite the admonition in **Section 7(1)(a)** that a public body make “every effort to assist the applicant.” It should have been obvious to the NSBI that a mistake was made.

My Alberta colleague’s responsibilities are different from mine. In Alberta and some other provinces, the Commissioner can make orders and overturn a decision of a public body. In Nova Scotia the Review Officer cannot overturn a public body’s decision. He can only make recommendations. The process, therefore, does not have the same constraints that would be imposed on a review of a decision that could be overturned. The Review Officer’s conclusions, if they don’t find favour with a public body, can be ignored.

The role of the Review Officer is, when warranted, to try to persuade a public body, by reason, to change or amend its decision. It is my practice to seek further representations from all parties and to share the arguments in these representations with all parties. I did that in this case.

With respect to the NSBI's arguments against waiving fees, I do not agree with its argument that the matter is not one of public interest because it does not relate to the environment or public health or safety, set out in s.7(b). This is not an exclusive list, but only examples.

In Report FI-00-91, which also had to do with the refusal of a request for a fee waiver, I expressed the view that there are degrees of public interest. While this application deals with a matter of some public interest and has attracted some media and other public attention, it has not provoked wide concern or interest among Nova Scotians. I have concluded a fee waiver is not warranted in this case.

If I thought the fee being charged was so large as to discourage public access I would recommend some compromise. In this case it's my view the fee is not an onerous one. The heaviest cost (\$90.00) was attached to creating the records requested which took 4.5 hours at \$10.00 per half hour. (The charges have since been increased to \$15.00 a half hour.)

DATED this 23rd day of July, 2002 in Halifax, Nova Scotia

Darce Fardy, Review Officer