

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

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF EDUCATION** to sever a Report it commissioned into irregular financial transactions at the **Strait Regional School Board**.

REVIEW OFFICER: Darce Fardy

REPORT DATE: June 27, 2002

ISSUE: Whether the disclosure of the entire Strait Regional School Board Audit Report would reasonably be expected to harm law enforcement.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated April 15, 2002, the Applicant asked that I recommend to the Department of Education (the Department) that it reverse its decision and disclose the Report without severing.

The Applicant had asked for a copy of the entire report into the financial irregularities at the Strait Regional School Board (the Board) completed at the request of the Department by *PricewaterhouseCoopers*. The Department based its decision on the exemptions under **Section 15(1)(a), (c), (f) and (g)** of the Act which allow a public body to refuse to disclose information when disclosure could reasonably be expected to:

- (a) harm law enforcement;
- (c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement;
- (f) reveal any information relating to or used in the exercise of prosecutorial

discretion;

- (g) deprive a person of the right to a fair trial or impartial adjudication.

In a representation to the Review, the Department said it claimed the exemptions under s.15(1) after consultation with the RCMP which is carrying out a criminal investigation.

The Department said that although it was advised by the RCMP to withhold the entire document it felt it was committed to informing the public of what had happened at the Board. However, the Department believes that disclosing the severed sections would harm the effectiveness of the RCMP's investigative techniques. It explained that the first investigative technique used in many criminal investigations is a forensic audit report such as the one at issue in this case:

The forensic audit report becomes a road map for all the avenues the RCMP would explore. Disclosing the report may indicate to certain individuals that search warrants could be expected, or it could identify lines of questioning pursued by the RCMP in its discussion with witnesses. Disclosure of the information in the report may also result in the destruction of documents which may be retrieved under a search warrant.

With respect to s.15(1)(f), the Department also argued that since a prosecutor, in deciding whether there is a reasonable chance to convict, would depend largely on the audit report, disclosure would reveal information to be used in the exercise of prosecutorial discretion.

The Department also said it was advised by the RCMP that revealing names in the report could deprive people of the right to a fair trial.

The Department disagrees with arguments put forward by the Applicant to support his application. He argues that "the RCMP has had unfettered access to the report and can conduct any investigation it wishes. . . . Major portions of the report have been leaked to the public already.

. . . releasing the entire report would allow details to be considered within a broader context.” Copies of the report were provided to the members of the Board but were retrieved on the advice of the RCMP and the members, I am told, agreed not to reveal any of it. The Department says it’s concerned that the full investigation of the finances of the Board may be hindered by the premature disclosure of some of the information in the report.

As part of my Review, I met with the RCMP for its views on how disclosing the severed portions of the report would harm law enforcement. The police supported the advice it gave the Department against making the report public. It explained that disclosing the names could put some individuals on notice that they were being investigated while disclosing other information would give suspects prior knowledge of the “avenue” the investigation was taking.

In accordance with **Section 38** of the **Act** I have been provided with a complete copy of the forensic audit report. In explaining my conclusions I am, of course, not at liberty to disclose more than is already in the public domain.

Conclusions:

It’s worth noting that the public is well informed about what happened at the Board. The Department disclosed the breadth of the financial irregularities in the Legislature where they have been discussed at length, and covered extensively by the media.

All access legislation in the country includes exemptions for records that could, if disclosed, harm law enforcement. In the Nova Scotia legislation, as in others, the head of a public body must prove that disclosure “could reasonably be expected” to harm law enforcement. Disclosure must be shown to do more than “interfere” with law enforcement. That the police would

be more comfortable doing this investigation without the disclosure of the severed parts of this report does not meet the expectations of s.15(1)(a).

The British Columbia Government's Manual applies a "harms test" to s. 15 of the B.C. Act, which uses the same language and number as this **Act** reads:

To harm a law enforcement matter means that disclosure would damage or be detrimental to law enforcement... a fear that disclosure would hinder, impede, or minimally interfere with a law enforcement matter does not satisfy this test."
(Section C.4.6., p.10)

The Federal Court, in *Rubin v. Canada (Minister of Transport)* (1997), 221, N.R. 145 (Fed C.A.), said that "(w)here the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard (of proof) is not met."

I accept the police argument that disclosing some of the names in the report could harm law enforcement and I agree with the Department's decision not to disclose them. I also accept the arguments that disclosing some other information could harm law enforcement.

With respect to depriving a person of the right to a fair trial, I believe that since a lot of information has already been made public, and that the main individuals have already been named, it is not reasonable to expect more harm to result.

I have concluded that more of the audit report can be disclosed without offending s.15(1).

Recommendations:

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

- on page 12, the first column and the fifth column

– pages 16, 17 and 18, with the names severed.

Section 40 requires the Department to make a decision with respect to these recommendations within 30 days of receiving this report and to provide that decision, in writing, to the Applicant and the Review Officer.

DATED this 27th day of June 2002 in Halifax, Nova Scotia

Darce Fardy, Review Officer