REPORT **FI-02-55**

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 with respect to a tax rebate provided to Sobeys Inc.

REVIEW OFFICER: Darce Fardy

REPORT DATE: July 19, 2002

ISSUE: Whether the information severed from the documents can be denied under exemptions related to advice to a minister and harm to the interests of third parties.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated May 13, 2002, the Applicant asked that I recommend to the Office of Economic Development (OED) that it provide him with the information he is seeking.

The Applicant, in an application dated March 5, 2002, asked for copies of

1. All records relating to a payroll rebate granted to Sobeys Group Inc. and, or Empire Group or any of their affiliate companies from August 2001 to present.

2. All records related to any other rebate or any incentive provided to Sobeys Group Inc., the Empire Group or any of their affiliate companies.

In its reply the OED said it was partially granting the application. It provided copies of four documents, all of them severed of information the OED believes is exempt from

disclosure under **sections 14(1)**, **20(1)** and **21(1)**. Other documents were denied in their entirety under s.14(1) and s.21(1)(a)(ii),(b), (c) (i), (ii) and (iii).

Section 14(1) allows the head of a public body to "refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister."

Section 20(1) requires a public body to refuse to disclose personal information if the disclosure would be an unreasonable invasion of a third party's personal privacy.

Section 21(1) requires a public body to "refuse to disclose to an applicant information

> (a) that would reveal
>
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
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> (b) that is supplied, implicitly or explicitly, in confidence; and
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> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position 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,
>
> (iii) result in undue financial loss or gain to any person or organization."

The OED gave notice of the application to two third parties whose interests could

be affected by the disclosure of the information. The third parties did not want the OED to disclose any parts of the documents, citing s.21(1), but the OED decided to provide severed copies in accordance with section 5(2).

In a representation to the Review, the OED defended its claim to the exemptions cited.

An edited letter dated November 5, 2001, from the Business Development Corporation to Sobeys, is severed of the name and title of the Sobeys' executive. The OED believes disclosing the name would be an unreasonable invasion of that person's personal privacy. It does not cite any particular subsection of s.20 to support that view. The OED said severing the name "does not impede the applicant's ability to understand the transaction."

A second edited letter, dated October 11, 2001, is severed of the name of the Sobeys executive for the same reasons as in the first letter.

The third document is a "Notes to File" dated November 5, 2001. Most of the financial figures in this document are denied under s.21(1). The OED recognizes that this exemption presents a three-part test. The document severed must contain financial or commercial information of a third party, it must have been provided in confidence and, finally, there must be a "reasonable expectation" of "significant harm" to the third party if the information is disclosed. The OED claims that disclosure could not only harm the competitive position of the third party but could also result in undue gain "to another third party negotiating with the government for a similar tax rebate. This is so because the tax rebate program allows not only for a range of reimbursement. . . but for other terms which are specific to a particular agreement to be a matter of negotiation between the parties."

The OED explained that revealing the particulars of a certain contract would result in other companies competing for the rebate knowing that the government had agreed to certain terms or percentages in the past. "This knowledge," it said, "would provide that company with an advantage, not afforded to Sobeys, in their negotiations for the rebate which is the subject of this Review."

The fourth document, dated October 5, 2001, is provided in severed form for the same reasons stated by OED above.

The two documents withheld in their entirety are denied under ss. 14(1) and s.21(1)(a)(ii), (b), (c)(i),(ii) and (iii). The OED claimed a single page Auditor's Report is exempt under s.14(1) because it contains advice to the Minister and under s.21(1) for reasons stated above in relation to documents three and four. The OED also made the argument that the author of the document intended it for the eyes of Sobeys and the government only. The OED made the same arguments with respect to the second document withheld in full, which is a single page "Schedule of Head Office Incremental and Gross Payrolls" of Sobeys.

Conclusions:

I refer readers to my Report FI-02-31 in which I reported on my review of the decision of the OED in response to an application for records related to the same tax rebate program. In that review I concluded that the OED had not to provided "detailed" and "convincing" evidence to support its claim of "significant" harm to the third party's interests.

I cited the Ontario Court of Appeal in *Workers' Compensation Board v. Mitchinson* (1989-09-03) c22695, the Federal Court of Canada in *Sawbridge Indian Band v. Canada (Minister*

of Indian Affairs and Northern Development) (1987) (F.T.R.) 48 and the Supreme Court of Nova Scotia in *Atlantic Highways Corp. v. Nova Scotia* (1997), 162 N.S.R. (2d) 27 to support my view.

In FI-02-31 I also questioned the OED's decision to cite s.21(1)(c)(ii) which allows a public body to withhold information of a third party if disclosure might result in a third party's refusal to provide information to the government. As I said: "A third party seeking financial assistance is unlikely to be in a position to refuse to provide the government with the information it requested to help it decide whether to provide assistance."

In my view, the OED has not met the burden of proof to support its opinion that disclosure would harm the competitive position of either Sobeys or any other company or individual seeking a tax rebate. To quote the Ontario Court of Appeal: "If 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).

In a recent Supreme Court of Canada case the Court addressed "reasonable expectation of harm":

> There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question; there must be professional experience that justifies non-disclosure (Lavigne v. Canada (Office of the Commissioner of Official Languages) [2002] S.C.J. No. 55 at ¶58).

The Auditor's Report to the Minister, denied under s.21(1) and s.14(1), is properly withheld under s.14(1) because it contains advice to a minister which cannot "reasonably be severed" to meet the requirements of s.5(2).

The second document denied in its entirety, the "Schedule of Head Office Incremental and Gross Payrolls" cannot, in my view, be withheld under s.14(1) because it contains factual material and not advice. As well, in my view, there is no convincing evidence to prove it can be exempted under s.21(1).

With respect to the information denied under s.20(1) and s.20(2)(a), in documents one and two, I am satisfied that disclosing the name of the executive would be an unreasonable invasion of privacy because it is not "desirable for the purpose of subjecting the activities of the Government of Nova Scotia. . . to public scrutiny" [s.20(2)(a)].

Recommendations:

Given that, in my view, the proof of harm under s.21(1) has not been met, that the OED disclose:

- All of document 3 called "Notes to File", dated November 5, 2001;
- All of document 2, the Management Representation Letter dated October 5, 2001 with the exception of the severances made under s.20(1); and
- all of the single page "Schedule of Head Office Incremental and Gross Payrolls."

Section 40 requires the OED to make a decision on these recommendations within 30 days of receiving this report and to make that decision known in writing to the Review Officer, the Applicant and any other persons provided with a copy of this Report.

Comment:

The decision letter to the Applicant does not provide enough detail to enable the applicant to make a proper representation to the Review. In *McCormack v. Nova Scotia (Attorney General) et al.* No. 08098 (1993) 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."

DATED this 19th day of July, 2002, in Halifax, Nova Scotia.

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Darce Fardy, Review Officer