REPORT **FI-02-56**

NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **EXECUTIVE COUNCIL** to sever documents provided to an Applicant.

REVIEW OFFICER: Darce Fardy

DATE: **September 4, 2002**

ISSUES: Whether **Subsection 13(1)** (substance of deliberations of the Executive Council); and **Subsection 14(1)** (advice to a minister) support the Executive Council's decision to sever documents.

Whether the Executive Council properly exercised its discretion before making its decision.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated May 17, 2002, the Applicant asked that I review the decision of the Executive Council to sever documents provided to him.

The Applicant had asked for:

> "All information, documents, memos, files, etc. that relate to the decision by the Province to close/suspend operations of the Nova Scotia Arts Council that exist at the Executive Council Office. As well any related information further to this decision up until the date that you commence the searches on this request."

His Application was "partially granted" and parts of the following records were provided to him:

- A Cabinet Minute letter from the Clerk to the Minister;
- A memorandum to Cabinet with attached Briefing Note, Communications Plan and attached covering memo from the Deputy Minister to the Clerk and;
- The "Report and Recommendation to the Executive Council" with attached Briefing Note.

The Applicant was told that the information severed was exempt from disclosure under **Subsections 13(1)** and **14(1)** of the **Act**:

> 13(1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.
>
> 14(1) The head of a public body may 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.

(**Subsections 13(2) and 14(2)** require a public body to disclose "background" information which is defined in **Clause 3(1)(a)** as, amongst other things, factual material, a statistical survey, a public opinion poll or an appraisal.)

During this Office's mediation process, the Executive Council agreed to disclose some of the information it originally denied the Applicant. The Applicant decided to continue with his Request for Review.

During the Review, the Applicant said he was looking for documents related to a statement he attributed to the Minister of Tourism and Culture (the responsible Department) that the decision would save money. He has made a similar application to the Department. The decision of the Department is also under Review by this Office.

In a representation to the Review Office, the Executive Council explained its reasons for citing the two exemptions:

- The text of the severed part of the Cabinet Minute letter reveals the specifics of the proposal put forward to the Minister and the Executive Council and explains what the ministers discussed;
- With respect to the Memorandum to Cabinet, the background information was disclosed because it was factual but the sections under "Objectives" and "Current Situation" were denied because they contain advice and recommendations and comments of the Arts Council which the Executive Council would, obviously, have taken into consideration in making its decision on the Arts Council.
- The Communication Plan and the Briefing Note were severed of "advice". Some of the denied information under the heading "background" is not "background" as defined in the **Act**.

Under **Section 38** I was provided with copies of the relevant documents.

Conclusions:

Courts have upheld the right of cabinets to deliberate in private.

> "The access legislation in most jurisdictions respects the confidentiality of certain records relating to matters before, or to come before, the executive of the government as represented by the Cabinet or Executive Council." (*Government Information: Access and Privacy* McNairn & Woodbury Pg 3-20)

However, the language used in the Nova Scotia legislation with respect to access to cabinet documents is different from that used in similar legislation across the country. In this **Act** the exemption is discretionary. As I wrote in my recent Review, FI-02-58:

> "This would indicate that the legislature intended to give a public body some leeway in determining whether documents containing the "substance of deliberations" of the Executive Council should be withheld from disclosure. If a public body cannot convince itself that disclosing such documents would harm the government's interests, then it might consider disclosing them...
>
> I see no danger in setting a precedent here. Each case must be decided on its own merits."

The Government of Alberta's manual on Freedom of Information and Protection of Privacy addresses the issue of "use of discretion". In the manual the following is highlighted:

> "**A public body must not replace the exercise of discretion with a blanket policy that certain types of information will not be released. However, public bodies can develop guidelines to help guide the exercise of discretion, providing they are not interpreted as binding rules.**" (Pg. 87, *Freedom of Information and Protection of Privacy, Guidelines and Practices,* Alberta, March 2002)

The manual says that in cases involving cabinet confidences, or the substance of deliberations of *in camera* meetings, there is no need to address the harm that disclosure may cause <u>"although this may be a factor in exercising discretion"</u>(emphasis added).

In *Order 2000-021,* the Alberta Information and Privacy Commissioner writes:

> The delegation of a discretionary power to a public body by the legislature under the Act gives a public body a degree of flexibility in the exercise of its delegated obligations.... A delegate's (FOIPOP Administrator) rationale for exercising his or her discretion in a particular way must be both demonstrable and reasonable. A delegate cannot abuse his or her own discretion by making an arbitrary or irrational decision.

The Alberta Commissioner provided some factors that should be taken into account when exercising discretion, an approach adopted in the Government's manual:

- the general purposes of the **Act** (i.e the right of access, accountability);
- the wording of the discretionary exception and the interests which the exception attempts to balance;
- whether severing is appropriate;
- the nature of the record and the extent to which it is significant or sensitive to a public body;
- whether the disclosure of the information will increase public confidence in the operation of the public body;
- whether there is a definite and compelling need to release the record.

In his Order quoted from above, the Alberta Commissioner makes reference to words used in *D. J. Galligan, Discretionary Powers: a Legal Study of Official Discretion* (Claredon Press: 1986) page 8. It notes that to have legislated discretion is "to have a sphere of autonomy within which one's decisions are in some degree a matter of personal judgement and assessment". The Commissioner believes "this sphere of autonomy, which can be broad or narrow, is the essence of a discretionary power granted by the legislature to a decision maker."

The Ontario Information and Privacy Commissioner urged public bodies to exercise discretion "in full appreciation of the facts of the case". He also said that while he may not have the authority to substitute his discretion for that of the head (of the public body), "I can and, in the appropriate circumstances, I will order a head to reconsider the exercise of his/her discretion if it has not been done properly". (Order 58).

In Order P-344 the Ontario Assistant Commissioner said:

> "In order to preserve the discretionary aspect of a decision... the head... must ensure that the decision conforms with the policies, objects and provisions of the Act.
>
> In considering whether or not to apply [certain discretionary exemptions], a head must be governed by the principles that information should be available to the public;... and that exemptions to access should be limited and specific."

In Order P-344 the Ontario Assistant Commissioner said that a "blanket" approach to the application of an exemption would represent an improper use of discretion.

Unlike the Ontario and Alberta Commissioners, Nova Scotia's Information and Privacy Review Officer does not have "order" powers. But, in my view, the statements of the Commissioners and of the Government of Alberta can apply in any jurisdiction. With that in mind I asked the Executive Council to provide the factors it considered in using its discretion to sever the documents. I was told there are no specific guidelines in place for the exercise of discretion.

In it's representation to the Review Office, the Executive Council said it denied access to information which it was convinced contained the "substance of deliberations" of the Cabinet. The Executive Council did not provide any representations outlining the factors it considered when it exercised its discretion. There is no evidence that it considered the underlying policies and goals of the Act.

With respect to the Executive Council's decision on this Application, the Council is to be commended for its willingness during this Review to cooperate in the Review Office's mediation process and to provide more information than it originally intended.

While I question the need to apply exemptions under both **ss.13(1)** and **ss.14(1)** on many of the documents, it has not become an issue in this Review because, in my view, the documentation now being denied the Applicant falls under at least one of those two exemptions. The denied information contains either the substance of deliberations of the cabinet (**ss.13(1)**) or advice to the minister (**ss.14(1)**).

Recommendation:

That the Executive Council follow the lead of the Government of Alberta and develop guidelines for the "exercise of discretion" and encourage other public bodies to do the same.

Section 40 requires public bodies to make a decision with respect to the Review Officer's recommendations within thirty days of receiving them and to notify the Applicant and the Review Officer in writing of that decision.

DATED at Halifax, Nova Scotia, September 4, 2002.

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Darce Fardy, Review Officer