

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

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF JUSTICE** to sever documents related to the Government's decision to raise fees under the provincial and municipal **Freedom of Information and Protection of Privacy Acts**.

REVIEW OFFICER: Darce Fardy

REPORT DATE: July 11, 2002

ISSUE: Whether exemptions under sections 13(1), 14(1) and 16 of the **Act** support the Department's decision to sever documents.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated May 29, 2002, the Applicant asked that I review the decision of the Department of Justice (the Department) to sever documents related to increasing fees for seeking access to government documents and asking for reviews of government decisions.

The documents included a Memorandum to the Executive Council and what is called a Report and Recommendation to the Executive Council which led to the decision to increase the fees. Other documents were copies of related correspondence between government officials. The Department cited exemptions under **sections 13(1), 14(1) and 16**. Section 13(1) reads:

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.

Section 14(1) allows a public body to deny documents which contain advice prepared for or by a public body or a minister.

Section 16 allows a public body to withhold documents subject to solicitor-client privilege.

It is the Department's position that the documents, severed in part or in their entirety, are exempt because they would reveal the "substance of deliberations" of the Executive Council, advice to a public body, or information subject to solicitor-client privilege. It believes it disclosed all the "background information" which it is required to do, when certain conditions exist, under ss.13(2) and 14(2).

The Department said the information withheld from the Applicant was in a cabinet memorandum or report and recommendation "and was inferentially at the core of the decision making process of the Executive Council." A draft memorandum was also included among the exempt documents because it "was the subject of discussion before the final instructions were provided."

The Department also severed correspondence between the Deputy Minister of Justice and the Treasury and Policy Board because it "contained information that focussed on what, by logical inference, were the instructions of the Executive Council (or the Treasury and Policy Board)."

On some documents the Department cited both ss.13(1) and 14(1). It is the Department's view that "because information appears in a cabinet document, and is subject to s.13 exemption, it is not precluded to claim the advice exemption [s.14] for the same record. This is particularly true of the communications plans or briefing notes which accompany cabinet submissions, and which one might logically infer, is one of the elements on which the Executive Council deliberated. It is also true of recommendations provided to the Treasury and Policy Board Secretariat."

The Department concluded that, in its view, it had met its obligations under **section 2**

of the **Act** to be open and accountable and to provide sufficient information to allow the Applicant to make a judgement with respect to the decision to increase fees.

Conclusions:

Having studied the documents provided to me in accordance with **section 38**, and after reading the Department's representation, I think it important to consider what is meant by "the substance of deliberations" of the Executive Council. In Review FI-00-01 I adopted a definition used by the Alberta Information and Privacy Commissioner: "substance" is the essence of what was considered and "deliberations" are "the act of weighing and examining reasons for and against a contemplated action or course of action." In my view, the "substance of deliberations" refers to the body of information and documents which the Cabinet used in reaching its decision.

A definition of "advice" is also helpful. Alberta's Commissioner defined it as "an opinion, view or judgement" based on the knowledge and experience of an individual and "expressed to assist the recipient whether to act and, if so, how" (Order 97-007). The Ontario Commissioner accepted "thoughts" and "views," as well as "advice," if they lead to a suggested course of action.

A decision of the Nova Scotia Court of Appeal (*O'Connor v. Nova Scotia* (2001) NSCA #132) with respect to s.13 must also be considered. The Supreme Court of Canada recently decided not to hear an appeal of this judgement. The Appeal Court ruled that if the conditions of s.13(2) ("background information") are met, a document must be disclosed even if it contains the "substance of deliberations" of the Executive Council.

Section 13 is an important exemption. All access legislation in the country respects the right of the cabinet to discuss matters in private. The wording of this exemption in the Nova Scotia **Act** is different from the wording in all the other legislation because it is discretionary. 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. This would be in line with a conclusion of the Nova Scotia Court of Appeal that the **Act** should be “construed liberally. . . so that doubt ought to be resolved in favour of disclosure” (*McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993) 125 N.S.R. (2d) 288).

I see no danger of setting a precedent here. Each case must be decided on its own merits. Providing access on one occasion would not mean that ss.13 or 14 could never be claimed again on a similar document.

I will comment on the severed documents as numbered by the Department.

1. This is a letter to the Minister dated February 21, 2002 which is denied under s.13. This is a request and, in my view, contains neither the substance of deliberations of the Executive Council nor advice.

2. This is an e-mail dated February 20, 2002, also withheld under s.13(1). I make the same comment I did in number 1.

3-8. Parts of this draft Memorandum to the Executive Council have been provided, the rest denied under s.13. The severed part on the first page of this document is, in my view, not exempt under s.13 for the reasons given in number 1. The entire third page of the Memorandum is severed. The three lines under “OBJECTIVE” and the three lines under “CONSULTATION” are, in my view, “background information” and, because the decision is made public, must be disclosed. 9

This is an e-mail dated February 25, 2002. My view of this e-mail is the same as my views expressed in 1 and 2.

10-12. Parts of this e-mail, dated February 26, 2002, were disclosed and parts withheld under ss.13 and 14. The severing of the first sentence cannot, in my view, be denied under ss.13 and 14 because it contains neither the substance of deliberations nor advice even though these words are used in the severed section. The last two paragraphs of the e-mail, not including the copy of the e-mail it is responding to, contain facts and not advice.

18. This is an e-mail dated February 28, 2002. There is no evidence this e-mail provides direction or, in my view, reveals the substance of what was deliberated on by cabinet.

19. This is an e-mail dated March 1, 2002. This e-mail asks questions. It does not provide advice and does not reveal the substance of deliberations.

21. The severed portion of this e-mail, dated March 3, 2002, is factual (“background information”).

23-24. This is a severed copy of a Communications Plan prepared by the Department’s communications officer in preparation for announcing a decision. Parts are denied under s.13 as well as s.14. My view, as expressed in many of my Reviews, is that such documents clearly contain advice to a minister and only the “background information” in the documents needs to be disclosed. But the Department, for reasons I don’t understand, also claims, under s.13, that the Plan contains the substance of deliberations of the Executive Council. I cannot accept that the communications plan (how to announce a decision) was part of the substance of deliberations of the cabinet, or the “essence” as the Alberta Commissioner defined it. It suggests that the cabinet did not make a decision on the fee raise until it considered and approved a communications plan. Such arguments have become a cause for concern for the Review Office because the Department appears to be “stretching” the definitions and using exemptions where they don’t belong and are not needed.

25. This document, a letter to the Minister dated March 6, 2002, is denied in full under

s.13. In my view, this document follows the decision of cabinet to raise fees. It cannot be described as the “substance of deliberations” of the Executive Council as it made its decision. It is not exempt under s.13.

26-32. This document is similar to the one in 3-8 and is signed. In my view the sections under “CURRENT SITUATION” and “OBJECTIVE” and the three lines under “CONSULTATION” are not exempt under ss.13 or 14.

33. This is a Briefing Note, sub-titled “Advice to the Executive Council.” My view of this is the same as I expressed in 23.

43. The Department attached solicitor-client privilege to an e-mail from a Department of Justice lawyer to the Department’s Administrator for this **Act**. This e-mail, like others among the documents withheld under s.16, exchanges information. The Department should consider using its discretion on such documents. In McNairn and Woodbury’s *Government Information, Access and Privacy*, solicitor-client privilege is described as:

a substantive rule for the exclusion of evidence in legal proceedings. A person who is privy to matters that originated in privileged circumstances is entitled to resist disclosure of those matters. Information protected by the privilege includes confidential communications, passing both ways, between a lawyer and his or her client that took place in the course of a professional relationship, whether or not in contemplation of litigation. However, the communications must be in the context of the client seeking legal advice from the solicitor (at 3-37).

To preserve this e-mail, and the others, under s.16, in my view, devalues the privilege that is important to uphold.

44. I have the same comment as I had in 43 for this e-mail.

45. This e-mail, dated March 6, 2002, is severed under ss.13 and 16. My comments on

solicitor-client privilege are the same as in 43 and 44. There is no claim that this e-mail went before the Executive Council for its consideration. It cannot be exempt under s.13.

46-49. These are e-mails to and from a Department lawyer and the Administrator. They are denied under s.16 and my comments are the same as above.

50-52. These three pages are undated. They are denied under ss.13 and 14, although the information in them is already in the public domain.

53-55. These pages contain an e-mail dated March 7, 2002 and an undated document. Both documents are withheld under s.16 but, in my view, do not contain “advice” from a solicitor to his client although the sender is a Department of Justice solicitor.

56-57. Two e-mails dated March 10, 2002 and March 15, 2002 from a Department solicitor to the Administrator. They are denied under s.16. My comments are the same as above.

58-60. Two e-mails to and from solicitors and the Administrator. In my view they contain information only and should not be denied under s.16. Also included, an e-mail to other government administrators for the **Act** from the Justice administrator. The Justice Department administrator is not acting as a solicitor.

85. This e-mail is dated March 20, 2002. It is withheld under s.16 even though neither the sender nor the recipient are acting in a solicitor capacity. It is also denied under s.13 but there is no evidence this document went before the Executive Council for its deliberations.

86-88. Three e-mails dated March 6, 2002 and March 20, 2002 and March 20, 2002 denied under s.16. My comments are the same as above.

89-94. Six e-mails denied under ss.13 and 14. One of them is a blank page with nothing on it but the names of the sender and receiver and the date.

95-96. One document, an e-mail dated March 7, 2001, is denied under s.16 but contains

no advice from a solicitor to a client. The second document is denied under s.13, but it is my view it contains no information that was part of the Executive Council's deliberations in deciding whether to raise fees.

Recommendations:

That the Department disclose, in addition to what it has already disclosed (using the same numbers used above):

- Page 1;
- Page 2;
- Page 3, the summary;
- Page 5, the parts under "OBJECTIVE" and "CONSULTATION";
- Page 9;
- Page 10, the entire first (two line) paragraph;
- page 12, the last 2 paragraphs, (1 sentence each) above the copy of the e-mail the document is responding to;
- Page 18;
- Page 19;
- Page 21;
- Page 25;
- Pages 26 - 27, the parts under "CURRENT SITUATION," "OBJECTIVE" and "CONSULTATION";
- Pages 43, 44, 45, 46, 47, 48 and 49;
- Pages 53, 54 and 55;

- Pages 56 and 57;
- Pages 58, 59 and 60;
- Page 85;
- Pages 86, 87 and 88;
- Pages 89, 90, 91, 92, 93 and 94;
- Pages 95 and 96.

Section 40 requires the Department to make a decision on these recommendations within 30 days of receiving this Report and to notify the Applicant and the Review Officer, in writing, of this decision.

DATED July 11, 2002 in Halifax, Nova Scotia

Darce Fardy, Review Officer

