

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

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF TOURISM AND CULTURE** to deny access to documents related to a government decision on the Nova Scotia Arts Council.

REVIEW OFFICER: **Darce Fardy**

DATE: **September 12, 2002**

ISSUE: Whether the severing of the documents is supported by **Section 13** (cabinet deliberations), **Section 14** (advice), **Section 20** (protection of privacy), **Section 16** (solicitor-client privilege) and **Section 17** (harm to government's financial interests).

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, received June 7, 2002, the Applicant asked that I review the decision of the Department of Tourism and Culture (the Department) to deny access to information related to the Government's decision to close the Nova Scotia Arts Council.

The Applicant did not receive a letter of decision, in this case, but was granted access to documents provided in their entirety and others severed in accordance with **Section 5(2)**. Some of the documents provided in their entirety were already in the public domain. On the documents were the section numbers of the exemptions used by the Department to sever them or deny them in whole. The exemptions cited were **Section 13(1)**, **14(1)**, **20**, **16** and **17**.

S.13(1) allows a public body to deny access to documents containing the "substance of deliberations" of the Executive Council.

S.14(1) allows a public body to refuse to disclose information containing advice to a minister.

S.20, a mandatory exemption, requires a public body to refuse to disclose personal information when disclosure constitutes an “unreasonable invasion” of personal privacy.

S.16 allows a public body to deny access to information subject to solicitor-client privilege.

Under **s.17**, a public body may refuse to disclose information if disclosure could reasonably be expected to harm the financial or economic interests of a public body.

In his request for a Review of the Department’s decision, the Applicant noted his application was broad and should have captured more documents than were considered by the Department. He believed the decision to close the Arts Council would have followed months of discussion within the Department and should have generated documents over that period.

The Applicant said he wants, specifically, access to information that would support a statement of the Minister that the decision would save money because of high administrative costs of Arts Council. In a news release the Minister said there would be \$270,000 in administrative savings.

The Department was asked to comment on the concerns of the Applicant. It said it was satisfied it had located and considered all relevant documents existing at the time the Application was received.

Section 45(1) of the **Act** puts the burden of proof on the public body to show why an applicant has no right of access to the record or part of the record. As a result, the Department was asked to provide evidence that the disclosure of the information denied under **s.17** would harm

the financial or economic interests of the Government. It explained that the financial figures severed were an estimate only. The one paragraph of the document that was disclosed provided the budget for salaries and benefits to the Arts Council.

Conclusions:

It should be noted that a similar application from the Applicant was made to the Executive Council. In my Report, FI-02-56, I reviewed the decision of the Executive Council. That Report deals at length with the need for guidelines to be used by public bodies when exercising their discretion on non-mandatory exemptions. The same concerns arise here.

Many of the documents are denied under **ss.13(1)** and **14(1)**. However, subsections **13(2)** and **14(2)** compel a public body to disclose “background” information as defined in **s.3(1)(a)** of the Act. **Ss 13(2)(c)(i)** reads:

Subsection (1) does not apply to

(c) (B)ackground information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees for its consideration in making a decision if

(i) the decision has been made public.

In my view the conditions of **s.13(2)(c)(i)** are met and information which meets the definition of “background information” must be disclosed. To quote the Nova Scotia Court of Appeal in *O’Connor v. Nova Scotia*, 2001 NSCA 132, para 108: “.. **s.13(2)** delineates those situations wherein the head of a public body has no discretion to produce the sought after information.” This ruling has been read to mean that if **s.13(2)** applies, any information that meets the definition of “background” must be disclosed regardless of its contents.

S.14(2) does not contain the same conditions as **s.13(2)**. **S.14(2)** obliges a public body to disclose any information that fits the definition of “background”.

In this Review I will refer to documents partly disclosed by their heading; and to the documents denied in their entirety by their page numbers which were assigned by the Department. As it is the substance of those very documents that are the subject of this review, in my comments I am unable to reveal any information about the contents of the documents at issue.

Documents disclosed in part:

The Briefing Note:

From this document the Department denied, under **s.14(1)**, sections headed “Issue”, “Key Message”, “Recommendation and Current Position” and a part of a section headed “Background”. In my view, all of the “Background” section meets the definition in **s.3(1)(a)** and must be disclosed.

Staffing:

This document was severed of all information but the first paragraph, under **s.17(1)**. In my view the Department has not met its obligation under **s.45(1)** to prove that disclosure would harm the financial or economic interests of the Government. I am not satisfied that any harm would follow disclosure.

Documents exempt in their entirety:

Pages 55 and 56

The information in these pages was denied under **s.13**. It is my view that a document such as this would not be considered by Cabinet in reaching its decision. This document may have been prepared for the Cabinet to consider after making its decision but does not, in my

view, contain the “substance of deliberations” of the Executive Council. Since that is the only exemption claimed it is my view it should not be withheld.

Pages 12 to 25, 55 and 56

The information in these pages was denied under the **s.13(1)** exemption but there is no evidence they went before the Executive Council. If they had I assume they would have been among the documents provided to me by the Executive Council for my Review FI-02-56. The Department believes the documents were prepared for Cabinet but not provided. While I recognize **s.13(1)** applies to documents submitted or prepared for submission to the Executive Council, the Department was not certain they were intended to be considered by the Cabinet. In my view they would not be exempt under **s.13(1)**.

Pages 37 to 44

The information in these pages was denied under **s.14(1)**. They contain communication advice, including draft letters, to be used in reply to questions respecting the decision to replace the Arts Council. In my view the Department has the discretion to deny access to this information.

Pages 51, 52 and 53

The information in these pages was denied under **s.17(1)** and **s.16**. There is no proof of harm to the interests of the Province and cannot, in my view, be exempted under **s.17(1)**. With respect to solicitor-client privilege I agree that some but not all of the document can be denied under that exemption. Some of the information is factual and does not, in my view, enjoy privilege.

Page 54

The information in this page is severed of parts under **s.13(1)** and **s.16**. It is my view that none of the information on this page can be denied under those exemptions. In my view they contain no more than agenda information.

Pages 107 and 108

The Department denied access to these pages claiming solicitor-client privilege. The Department said it claimed **s.16** because the author of the document is a solicitor acting on behalf of a client. This document is not a communication between a solicitor and her/his client. The writer was not giving legal advice to the Government. The writer should have been regarded as a third party to determine if she had any objections to having the memo disclosed. I contacted the writer who confirmed she was not acting as a solicitor and had no objections to having the memo disclosed.

Pages 110 to 113 and 121 to 123

The information on these pages denied under **s.16**, is not, in my view, a communication “in the context of the client seeking legal advice from a solicitor”. (McNairn and Woodbury, *Government Information: Access and Privacy*, 3.12.) In my view it cannot be refused under **s.16**.

Other documents

Although the Department assured me it had provided the Review with all relevant documents, it missed at least one. During my Review FI-02-56, noted above, the documents provided to me by the Executive Council included a letter bearing the signature of the Deputy Minister of Tourism and Culture. I assume this document is also in the possession of the

Department and should have been found and provided for this Review. In light of this, I would suggest the Department do a further search to satisfy itself that the Deputy Minister's letter is the only relevant document I have not been provided with for this Review.

Recommendations:

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

- the severed section under "Background" in the Briefing Note;
- the document on pages 6 to 10;
- the documents on pages 12 to 25;
- the document titled "Staffing" on pages 49 and 50;
- from the document on page 51, the first three bullets under paragraph 2;
- all of the deleted parts on page 54;
- pages 55 and 56;
- pages 107 and 108;
- pages 110 to 113;
- pages 121,122 and 123.

I recommend that the Department do a further search and if it finds other relevant documents to make a subsequent decision at that time on whether to withhold or disclose and to provide a copy of the decision to the Applicant and the Review Officer. The Review Officer will consider any request for a review of the subsequent decision as part of this Review.

Section 40 of the **Act** requires the Department to make a decision on these recommendations within thirty days of receiving them and to inform the Applicant and the Review Officer in writing of this decision.

DATED at Halifax, Nova Scotia, September 12, 2002.

Darce Fardy, Review Officer