

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

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF JUSTICE** to provide severed documents related to a government decision to locate a new correctional facility in Yarmouth

REVIEW OFFICER: Darce Fardy

REPORT DATE: **October 7th, 2002**

ISSUES:

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

Whether the Department properly exercised its discretion in reaching its decision.

Whether a successful argument can be made that the information should be disclosed "in the public interest" (s.31);

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated July 8, 2002, the Applicant asked that I recommend to the Department of Justice (the Department) that it disclose all of the information he has asked for.

In his application the Applicant asked for copies of all records relating to the recent decision to locate the Western Nova Scotia Correctional Facility in Yarmouth. Documents

he specifically listed include copies of all memos, proposals, recommendations, letters and costings. In accordance with **Section 11(5)**, the Department provided the Applicant with an estimate of the fee of \$420.00 which would be charged for processing the Application. Having received the estimate, and during this Office's mediation process, the Applicant narrowed his request to documents that went before the Executive Council. The Department, in its response to the Applicant, said his application was being granted in part. He was provided with a severed copy of several documents including one titled "Memorandum to Treasury and Policy Board". The request for a review followed. At the same time he asked for a review of the fees.

This particular Review will consider only the Department's decision to grant the Applicant partial access to the documents. The fee review will be done in a separate report.

The Department claimed exemptions for the severed portions of the documents under **Sections 13(1)** and **14(1)** stating, "(w)e have provided background information that does not, in our view reveal the substance of deliberations of the Council or any of its committees".

The sections cited have two important subsections:

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 of any of its committees.

13(2) Subsection (1) does not apply to

- (a) information in a record that has been in existence for ten or more years;

- (b) information in a record of a decision made by the Executive Council or any of its committees on an appeal pursuant to an Act; or
 - (c) background 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,
 - (ii) the decision has been implemented, or
 - (iii) five or more years have passed since the decision was made or considered.
- 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.
- 14(2) the head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.

In *O'Connor v. Nova Scotia* (2001) NSCA 132 (*O'Connor*), the Court of Appeal considered the scope of “Cabinet confidentiality” in Section 13 and recognized that the Act should be interpreted generously in favour of disclosure. While the Court agreed that the substance of Cabinet deliberations could be protected, it made it clear that there are exceptions to this exemption. The Court held that **background information** on a decision, once that decision has been made by Cabinet as in this case, should be disclosed under 13(2).

Representations were received by the Department in support of its decision. The Applicant believes the Department should consider disclosing more information because the matter is one of public interest and should be disclosed in accordance with **Section 31** which allows a public body, with or without an application for access under the Act, to disclose

information when disclosure is “clearly in the public interest”. This section applies notwithstanding any of the provisions or exemptions in the **Act**.

Conclusions:

Substance of deliberations as provided by Section 13(1):

This phrase is not defined in the **Act**. In *O’Connor*, the Court of Appeal said that there was no need to give a broad, expansive definition to “substance of deliberations”. The test the Court put forward is whether someone could **accurately infer** from the disclosure of a document, the substance of deliberations of Cabinet. If the answer is yes, then the Section 13(1) exemption could be applied to the document. However, **even if the Section 13(1) exemption applies**, if the document fits the exception contained in Section 13(2), the Court has held that the information should be disclosed.

In a written representation to the Review Office, the Department said that it claimed Section 13 because disclosure would reveal the substance of deliberations of the Treasury and Policy Board. The Department stated:

“Information that would not reveal the substance of deliberations, and which was required to be disclosed under subsection 13(2) of the Act, was disclosed.”

In a second written representation, the Department explained how the Application was processed in accordance with s.13(2).

“Once a decision of the Executive Council has been made public or implemented, the department is required to disclose background information in cabinet records if the information meets the definition in Section 3 and the regulations (as amended). In our

view the information that is being withheld consists of information the disclosure of which would reveal the substance of deliberations, and which is not background information as defined in Section 3.”

The Department also informed the Review Office that in light of the refusal of the Supreme Court of Canada to grant an application to appeal the *O'Connor* decision, which occurred after the Department made a decision on this Application, it was “willing to revisit our position on the records relative to the relationship between subsections 13(1) and 13(2).” The Department subsequently provided more information to the Applicant. The Department said it was now satisfied that, with the additional disclosure, the Applicant now knows why the Yarmouth site was chosen.

From *O'Connor*, I draw the conclusion that the phrase “substance of deliberations” means what people would expect it to mean. Included, in my view, would be the advice and opinions that were put before the Cabinet, as well as options considered and arguments made during the deliberations. Information reflecting these discussions would clearly be exempt under Section 13(1). In my view, the representations of the Department suggest that if the information fits Section 13(2) it would be disclosed **unless** it contained “the substance of deliberations” of the Cabinet or any of its committees. Given my interpretation of the Court’s decision in *O'Connor*, it is my view that the Department’s analysis in respect of the relationship between the discretionary exemption provided by Section 13(1) of the **Act**, and the exception provided by Section 13(2) is incorrect. To quote *O'Connor*:

That is to say, s13.2 delineates those situations wherein the head of a public body has no discretion to refuse to produce the sought after information. The obvious intent of the Legislature in adding a.13(2) was to provide those few and specific limits to the scope of

s.13(1), rather than purporting to specify “limited exceptions to the right of access” referred to in s.2(a)(iii).

As a result of this ruling I do not agree with the Department that s.13(1) can be claimed on all the withheld information.

Exercise of discretion:

The Nova Scotia *Freedom of Information and Protection of Privacy Act* is the only one in the country where the cabinet privilege exemption is discretionary. It allows public bodies to use their discretion in determining whether or not to disclose Cabinet documents. I addressed this matter extensively in my recent Report, **FI-02-56**, where I noted the support of the Alberta Government and its Information and Privacy Commissioner for the need of established guidelines that should be developed when a public body is citing a discretionary exemption.

The Alberta Commissioner expects FOIPOP Administrators’ rationale for exercising her or his discretion in a certain way to be demonstrable and reasonable. The Commissioner states that an arbitrary or irrational decision is abuse of the decision-maker’s discretion. He has also provided several factors to be considered when exercising discretion, including:

- the general purposes of the **Act** (i.e. the right of access and accountability);
- the wording of the discretionary exception and the interests which the exception attempts to balance;
- whether severing is appropriate;

- the significance and sensitivity of the information to the public body;
- whether disclosure will increase public confidence in the operation of the public body; and
- whether there is a definite and compelling need to release the record.

The Alberta Government, which adopted the Commissioner's factors in its access and privacy legislation manual, told its FOIPOP Administrators that they "must not replace the exercise of discretion with a blanket policy that certain types of information will not be released".

Recognizing there is no need for a public body to address the harm the disclosure may cause, the manual says "this may be a factor in exercising discretion". This supports my frequent suggestions to public bodies that they ask themselves what harm disclosure would do, when considering applications for information that went before Cabinet.

The Department has expressed the view that it need not include "harm" as a factor in exercising its discretion.

During my Review I asked the Department to provide me with a written representation explaining the use of its discretion on this application. In its reply it wrote:

"In making this decision, the department viewed relevant factors such as the nature of the records, the principle of cabinet confidentiality and the issues involved".

In a subsequent written representation in support of severing, the Department said that in determining whether to disclose information containing policy considerations, it

"..looked at the degree of public interest involved, the information already being provided elsewhere in the record, i.e. the background

to the decision, and the fact that in revealing what would appear to be information at the core of the deliberative process. Information at the core of the deliberative process would breach the important principle of cabinet confidentiality in our view.”

It is my view that the comment with respect to the principle of cabinet confidentiality does not recognize the need for public bodies to consider each application for cabinet documents case by case, which is a necessary element in the exercise of discretion. A strict adherence to principle would, in my view, interfere with a case by case analysis.

The exercise of discretion must include a consideration of the factors that favour disclosure as well as those that do not.

The severing:

I have read the relevant documents carefully to determine whether any of the withheld portions contain the “substance of deliberations” of the Cabinet and if so, whether in my view, any “background information” has been withheld.

With respect to “background information” I will be guided by the definition in **Section 3(1)(a)** and the recent amendment to the Regulations which provides definitions for the words and expressions used in that subsection.

The documents in dispute that are all severed with exception of a one-page document, which has been denied in its entirety under s.13(1) or/and s.14(1), are:

- a “Memorandum to Treasury and Policy Board”, most of which was denied;

- a three-page attachment which had been denied in its entirety but has now been partly disclosed;
- a “Briefing Note” from which two sentences were disclosed;
- a document titled “(Advice to Executive Council)” most of which was denied.
- a document, all of which was denied.

In my view, the final document listed, which I can’t identify because all of it has been withheld, does not contain the “substance of deliberations” and does not contain advice to a public body or a minister to be exempt under s.14(1). It should be disclosed.

With respect to the Memorandum I am satisfied the “background information” has been disclosed and that the denial of the remainder is supported by s.13(1).

With the Department’s subsequent decision to disclose what I regard as “background information” from the three-page “Attachment”, I am satisfied that Section 13(1) supports the severing. S.14(1) was also cited for denying access to parts of this document but, if it went before cabinet, there is no need, in my view, to cite more than s.13(1).

I am satisfied that s.14(1) supports the severing of the Briefing Note and the document titled “(Advice to Executive Council)”.

Public interest:

This phrase is not defined in the **Act** but in earlier Reviews I have listed factors to be considered when determining when a matter is one of public interest.

These factors include:

- (a) Has the matter been the subject of recent public debate?
- (b) Does the matter relate directly to the environment, health or safety?
- (c) Would dissemination of the information yield a public good by assisting public understanding of an important policy?
- (d) Do the records show how the public body is allocating financial or other resources?

Although all of these questions do not require a positive response, it is my view, that the matter has not aroused the kind of public reaction that would warrant disclosure in the public interest. Nor is it my view that the matter is directly related to the environment, health or safety. While the information requested may satisfy the factors in (c) and (d), this would not tip the balance in favour of disclosure. I do not agree that the matter is of such public interest as to warrant an override of any exemptions.

Recommendation:

That the Department

- disclose the document denied in its entirety;
- follow the lead of the Government of Alberta and prepare guidelines to be used by the Department when exercising its discretion; and
- write to the Applicant reaffirming the decisions it made with respect to the cabinet documents he requested.

Dated at Halifax, Nova Scotia, October 7th, 2002

Darce Fardy, Review Officer