

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

A REQUEST FOR REVIEW of a decision of **SERVICE NOVA SCOTIA AND MUNICIPAL RELATIONS** to sever documents in response to an application for access to background information related to Bill 128.

REVIEW OFFICER: Darce Fardy

REPORT DATE: November 13th, 2002

ISSUE: Whether Sections 13(1) [cabinet secrecy], 14(1) [advice to a minister] and 16 [solicitor client privilege] support the decision to sever.

Whether the public body properly exercised its discretion in reaching its decision.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated August 12, 2002, the Applicant asked that I review the decision of **Service Nova Scotia and Municipal Relations** (the Department) to sever documents that were provided to her. She had asked for copies of all background information related to Bill 128 provided to Cabinet (Bill 128 is an Act to amend the *Municipal Government Act*. The *MGA* has not been amended).

The Applicant was provided with part of the relevant documents but denied access to other portions under exemptions found in **Sections 13(1), 14(1) and 16**. During mediation by

this Office, the Department disclosed some portions of the records to which it had earlier denied access. The information still in dispute is:

- the severed portions of a 7-page document entitled “Request for Legislation”;
- the severed portions of a 4-page document entitled “Drafting Instructions, Amendments to the *Assessment Act* and the *Municipal Government Act*”;
and
- a severed 2-page document labelled “Advice to Minister/Executive Council”.

S.13(1) reads:

Deliberations of Executive Council

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.

Subsection 13(2) says s.13(1) does not apply to background information in a record used by the Executive Council or any of its committees if a decision has been made or implemented.

S.14(1) reads:

Advice to Public Body or Minister

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.

Subsection 14(2) requires a public body to disclose background information used by a public body.

Section 16 allows a public body to refuse to disclose information subject to solicitor-client privilege.

After mediation the Department made a submission to the Review. At that time I accepted Section 12(1) as a supplementary exemption.

12(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following or their agencies:

(ii) a municipal unit or school board.

The Department's submission:

Substance of deliberations:

The Department says the information denied meets the definition of substance of deliberations found in my Report FI-02-58 in which I said that “the ‘substance of deliberations’ refers to the body of information and documents which the Cabinet used in reaching its decision”.

It said the information severed in both the “Request for Legislation” and the “Briefing Note” contain advice, recommendations and draft legislation the Department proposed to Executive Council, to assist it in determining whether to act and how.

Background information:

In its submission the Department cited recent amendments to the Regulations of this **Act** which defined “factual material”, as “a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts”. [“factual material” is a definition of “background information” found in s.3(1)(a)]. The Department believes this definition of factual material strengthens its case.

The Department then argued that because the Department’s advice and recommendations “were not adhered to” by the Executive Council that “the course of action” was not taken and therefore the information did not meet the accepted definitions of “advice”.

Harm to provincial/municipal relations:

It is the opinion of the Department that disclosing the *Drafting instructions* could harm relations between the Government and some municipalities because of possible negative reactions from voters in the municipalities.

Solicitor-client privilege:

The Department, which applied this exemption (s.16) to drafting instructions, made no case in its oral or written submissions to support this.

Conclusions:

Substance of deliberations:

In determining whether documents contain the “substance of deliberations” of the Executive Council or one of its committees we can follow the guidance of the Nova Scotia Court

of Appeal in *O'Connor v. Nova Scotia* (2001) NSCA 132. It cautioned against an expansive definition of “substance of deliberations” and it stated that the **Act** should be interpreted generously in favour of disclosure. The test the Court wants followed is to determine whether disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations. If the answer is yes then s.13(1) can be applied.

While the right of Cabinets to deliberate in private is established, I have not been convinced that disclosing a summary of the proposed request for legislation would reveal anything about the Cabinet deliberations. In my view the request reveals only what the Cabinet was asked to deliberate on.

The second document at issue contains questions and answers to be provided with the request for legislation. A part of the first page has been disclosed. The disclosed part advises the writer to answer all questions without “reference to the draft bill or the instructions”. The answers provide explanations but they do not, in my view, reveal Cabinet deliberations. In my Report, FI-02-77 I expressed the view that the “substance of deliberations” of the Executive Council should reflect options considered and arguments made during deliberations. Documents containing such information would clearly reflect, in my view, the substance of the Cabinet’s deliberations around the request for an amendment to legislation.

I believe I am following the advice in *O'Connor* when I remind the Department that titling a document “STRICTLY CONFIDENTIAL” doesn’t automatically put it outside the reach of this **Act**.

Advice:

There is no need to cite s.14(1) on information on which s.13(1) is also claimed. The “substance of deliberations” is defined in s.13(1) to include “advice”. S.14(1) should be reserved for advice provided to a public body or minister outside the Cabinet’s deliberative process.

In my view only the section under COMMUNICATIONS in the “Request for Legislation” reveals advice and this can be denied in accordance with s.13(1).

Background information:

It is not clear why the Department raised the definition of “factual information” found in the amended Regulations. However, I take exception to the Department’s argument that advice provided to the Executive Council could not be defined as such because the advice “was not adhered to” and therefore there was no “course of action”. The “course of action” of the Executive Council, in my view, was to refuse to take the Department’s advice.

Solicitor-client privilege:

I am satisfied that draft legislation prepared for Cabinet by its legal advisors was properly exempted.

Harm to inter-government relations:

I cannot accept that s.12(1)(a)(ii) can be claimed as an exemption because there is no evidence that disclosing these documents would harm relations between the Government and a municipality.

The use of discretion:

Since the *O’Connor* decision, cited above, I have been asking public bodies to explain how it used its discretion in determining what information to disclose and what to deny.

In FI-02-77 I suggested factors for a public body to consider when exercising its discretion. To paraphrase the Government of Alberta in its guidelines to its access and privacy administrators, it is appropriate that the Review Officer assure himself that a public body had not replaced the exercise of its discretion with a “blanket policy that certain types of information will not be released”.

I am satisfied that this Department demonstrated to me at my request, that it used its discretion before deciding that the documents would be severed, considering, among other matters, that Bill 128 was already a public document.

During an oral submission to the Review, the Department said the documents may not be relevant to the application because none of these documents were placed before Cabinet. Since then I have satisfied myself that the documents went before a committee of the Executive Council and are therefore subject to s.13(1). In any event it is unlikely I would have accepted the Department’s argument at this late stage in the process that the information it had identified as relevant when it responded to the original application was no longer relevant.

Recommendations:

That the Department disclose, in addition to what it has already disclosed

- The first page of the “REQUEST FOR LEGISLATION” now that the bill is in the public domain and;
- Part E on page 3 of the questionnaire.

Dated at Halifax, Nova Scotia, this 13th day of November, 2002.

Darce Fardy, Review Officer