REPORT **FI-02-81**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **EXECUTIVE COUNCIL** to deny access to copies of agendas for Cabinet meetings.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **December 13th, 2002**

ISSUE: Whether the agendas of Cabinet meetings reflect the "substance of deliberations"of Cabinet and can be denied under section 13(1).

In a Request for Review, under the **Freedom of Information and Protection of Privacy Act**, dated August 29, 2002, the applicant asked that I review the decision of the Executive Council to refuse to disclose the agendas for four Cabinet meetings. The Executive Council cited the exemption under **Subsection 13(1)** which allows a public body to refuse to disclose information that contains the "substance of deliberations" of the Cabinet.

During this Office's mediation process, the Executive Council provided the Applicant with a severed copy of one agenda so that he could get a sense of how Cabinet meetings proceed. The Applicant chose to pursue the Review.

Subsection 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.

Submission of the Executive Council:

In accordance with **section 38** I have been provided with unedited copies of the four Cabinet agendas. For this Review, the Executive Council provided this Office with the most complete submission on the exemption under ss.13(1) it has received to date. I will quote as liberally as I can from it, though I am not at liberty to reveal some of the particulars of the argument put forward by the Executive Council because they contain details of the agendas.

The legal argument: The O'Connor decision:

The Executive Council found support for its decision in the *O'Connor* decision in which the Nova Scotia Court of Appeal set out the following test to determine whether information is properly withheld under subsection 13(1). It quoted from the ruling:

> Thus the question to be asked is this: Is it likely that the disclosure of the information would permit the reader to draw accurate inferences about Cabinet deliberations? If the question is answered in the affirmative, then the information is protected by the Cabinet confidentiality exemption under s.13(1). [*O'Connor* v. *Nova Scotia* (2001) NSCA 132, para 92]

According to the Executive Council, "(t)he Court also supported the finding of the trial judge that subsection 13(1) protects more than "Cabinet's actual deliberations (in a verbatim sense). **It would also protect information that would infer the 'substance of deliberations' (in a tangential sense)**"" (Emphasis theirs).

The Executive Council looked specifically at the word "advice" pointing out that the chambers judge endorsed the following statement by the Ontario Information and Privacy Commissioner:

> ..advice pertains to the submission of a suggested course of action, which will ultimately be accepted or rejected by its recipient during the deliberative process.

With respect to the purpose of s.13(1), the Executive Council again cited *O'Connor* in which the Court cited the chambers judge's view that:

> ...it is equally clear that the purpose of s.13(1) is to protect Cabinet confidentiality as an important exception to broad disclosure.

The Executive Council, continuing its submission, again quoted from *O'Connor* where the Court cited the chambers judge's confirmation that Cabinet confidentiality "is a well recognized and important exception to the notion of broad disclosure". It also quoted from Lord Reid in *Conway*, as approved by Justice La Forest of the Supreme Court of Canada in *Carey v. Ontario*:

> To my mind the most important reason [for refusing disclosure] is that such disclosure would create or fan ill-informed or captious public or political criticism.[*Conway v. Rimmer*, (1968) A.C. 910, *Carey v. Ontario,* (1986) 2 S.C.R. 637]

> The Executive Council again quoted from *Carey*:

> I would agree that the business of government is sufficiently difficult that those charged with the responsibility for running the country should not be put in a position where they might be subject to harassment making Cabinet government unmanageable.

The Executive Council's substantive argument:

Having set out the legal principles for its argument the Executive Council raises and answers the question: "(w)ould disclosure of Cabinet agendas permit the reader to draw accurate inferences about Cabinet deliberations"?

The Executive Council believes that the information contained in Cabinet agendas would permit the reader to "draw accurate inferences" about Cabinet **deliberations** (emphasis added by Review Officer), because the agendas contain highly detailed information and that the headings contain specific advice and recommendations to the Cabinet. In its representation, the Executive Council drew attention to some specific details of several agendas to support its argument.

The Executive Council also referred the Review Officer to Information and Privacy procedure manuals of the governments of British Columbia and Alberta and cited sections of them. Both manuals provide lists of documents which would reveal the substance of deliberations of the Executive Council and Cabinet agendas are listed among them.

Because s.13(1) is a discretionary exemption the Executive Council explained how it used this discretion. It weighed Cabinet confidentiality against the purpose the **Act** found in Section 2 and the purpose of ss.13(1) and concluded that, given the highly sensitive nature of the documents in dispute, Cabinet confidentiality prevailed.

The Review Officer's response to the submission:

With respect to the legal arguments set out in the Executive Council's submission, I agree that a public body, while considering whether or not to disclose information, should look to the purpose of the **Act** as a whole and not just to the purpose of a particular section. This approach has been endorsed by the Courts and the challenge before the public body is to weigh the purpose of the **Act** against the purpose of the particular section, keeping in mind that the application of an exemption must be limited and specific and not a blanket approach.

The approach to the purpose of the ***Act*** *as a whole:*

O'Connor said the Nova Scotia Legislature had identified three objectives as constituting the purpose of the **Act**:

- to ensure public bodies are **fully** accountable to the public (the Court paid particularly attention to the words "fully accountable");
- to provide for the disclosure of **all** government information, subject to certain exemptions said to be **"limited and specific"**; and
- to protect the privacy of individuals over their own personal information. (Emphasis added)

O'Connor continued:

> **...it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.**

O'Connor therefore concluded that the Nova Scotia **Act** "is deliberately more generous to its citizens and is intended to give the public access to information that might not otherwise be contemplated" in other jurisdictions in the country.

With respect to the meaning of phrases like "substance of deliberations" the Courts have urged the use of the "ordinary meaning"of words. The Supreme Court of Canada, in a recent decision, said ordinary meanings must be considered harmoniously with the purpose of the legislation and the purpose of the particular exemption. [*Macdonell* v. *Quebec* (*Commission d'acces a l'information*) [2002] S.C.J. No. 71]

In the application of subsection 13(1) to the information contained in the agendas, I agree that cabinet secrecy is an "important exception to broad disclosure". I also agree with the definition of "advice" submitted by the Executive Council but I remain unconvinced that the agendas contain "advice" as defined.

However, on the specific point that an agenda item constitutes a summary of the Report and Recommendations to Cabinet, I am satisfied that portions of the agendas contain "recommendations" and that those recommendations reflect "the substance of deliberations" of the Cabinet. Therefore they attract the protection of subsection 13(1). I repeat that while I respect public bodies' sensitivity toward cabinet documents, they should be careful, in line with the purposes of the **Act** not to throw a blanket exemption over all information that goes before or is prepared for cabinet.

In para 94, the Court offered direction to public bodies and the Review Officer when examining "labelled" information:

> Among other questions, the examiner will want to know: how the information is labelled or characterized by government, what it purports to be or do, and what in fact, it is or does. However, no government can hide behind labels... There is no shortcut to inspecting the information for what it really is and then conducting the required analysis under s.13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet **deliberations** (Emphasis added). The Review Officer must always be wary of such traps before embarking upon the necessary inquiry.

On subsection 13(1).

I question the Executive Council's view that *O'Connor* supported the statement attributed to the chambers judge in paragraph 97 of *O'Connor*. In paragraph 101 the Appeal Court made it clear it was not endorsing the chambers judge's views.

Would disclosure permit the reader to draw accurate inferences about Cabinet deliberations?

Having examined the agendas I agree with the Executive Council that they contain the substance of deliberations of the Cabinet. The examples provided to me from the June 5, 2002 Cabinet meeting reveal "recommendations" that reflect the "substance of deliberations". However, other agenda items provide information that do not, and therefore should not be denied. In my view they can be severed in accordance with Section 5(2) and provided to the Applicant.

The Executive Council referred me to the procedures manuals of the British Columbia and Alberta Governments. In the B.C. example, from its 1994 manual, the government includes Cabinet meeting agendas as protected under Cabinet secrecy but the example it chose to use ("a list of issues tabled at Cabinet that reflects the priorities of Cabinet") would suggest that

not all agenda items would be protected from disclosure. I agree that the other examples listed in the manual contain the substance of deliberations of the Cabinet.

I would also point out that the B.C. manual also provides definitions for "substance" and "deliberation", recognizing that careful scrutiny of Cabinet agendas is necessary to separate exempt information from other information. As an example the manual notes that a document may appear benign like a letter inviting someone to appear before Cabinet, but when linked with other information or media reports, would implicitly reveal the substance of deliberations of the Cabinet. I agree with that observation.

Conclusions:

I have concluded that not all of the information in the agendas reflects the "substance of deliberations". I have also determined that none of the provisions of subsection 13(2) apply.

I am satisfied the Executive Council has properly used its discretion in making its decision.

Recommendations:

Attached to the Executive Council's copy of this Report are copies of the agendas with those sections I recommend be disclosed highlighted.

Section 40 of the Act requires the Executive Council to make a decision on this recommendation within 30 days of receiving this Report and to notify the Applicant and the Review Officer, in writing, of the decision.

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

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Darce Fardy, Review Officer