

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

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF ENVIRONMENT AND LABOUR** to deny access to documents regarding a domestic oil spill.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **March 25th, 2003**

ISSUES:

- Whether exemptions under Sections 20 and 21 support the decision to sever documents.
- Whether documents regarded by the Department as irrelevant to the application should have been considered
- Whether an adequate search was made for relevant documents.

In a Request for Review, under the **Freedom of Information and Protection of Privacy Act**, dated December 10, 2002, the Applicant asked that I review the decision made by the Department of Environment and Labour (the Department) on her application and recommend that the severed information be provided to her.

The Applicant asked for copies of all the information in the Department's files with respect to a remedial activity report concerning an oil spill at her home. The Applicant purchased a property on which there had been an oil spill under a previous owner.

The Department provided documents with personal and third party information removed in accordance with **Sections 20 and 21** of the **Act**.

Section 20 obliges a public body to refuse to disclose personal information if disclosure constitutes an unreasonable invasion of the personal privacy of a third party.

Personal information

20 (1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable;
and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(a) the personal information relates to a medical, dental, psychiatric, psychological or other health-care history, diagnosis, condition, treatment or evaluation;

(b) the personal information was compiled and is identifiable as part of an investigation into a possible violation of law, except to the extent that disclosure is necessary to prosecute the violation or to continue the investigation;

(c) the personal information relates to eligibility for income assistance or social-service benefits or to the determination of benefit levels;

(d) the personal information relates to employment or educational history;

(e) the personal information was obtained on a tax return or gathered for the purpose of collecting a tax;

(f) the personal information describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations;

(h) the personal information indicates the third party's racial or ethnic origin, sexual orientation or religious or political beliefs or associations; or

(i) the personal information consists of the third party's name together with the third party's address or telephone number and is to be used for mailing lists or solicitations by telephone or other means.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(a) the third party has, in writing, consented to or requested the disclosure;

(b) there are compelling circumstances affecting anyone's health or safety;

(c) an enactment authorizes the disclosure;

(d) the disclosure is for a research or statistical purpose and is in accordance with Section 29 or 30;

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;

(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body;

(g) the information is about expenses incurred by the third party while travelling at the expense of a public body;

(h) the disclosure reveals details of a licence, permit or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit; or

(i) the disclosure reveals details of a discretionary benefit of a financial nature granted to the third party by a public body, not including personal information that is supplied in support of the request for the benefit or is referred to in clause (c) of subsection (3).

(5) On refusing, pursuant to this Section, to disclose personal information supplied in confidence about an applicant, the head of the public body shall give the applicant a summary of the information unless the summary cannot be prepared without disclosing the identity of a third party who supplied the personal information.

(6) The head of the public body may allow the third party to prepare the summary of personal information pursuant to subsection (5).
1993, c. 5, s. 20.

S.21(1)

This is also a mandatory exemption, which requires a public body to deny access to confidential information about third parties when certain conditions exist. The records in question must contain financial information of a third party, which was provided to the public body in

confidence and which, if disclosed, could reasonably be expected to do significant harm to the competitive position of, or result in undue financial loss or gain to a third party.

In a written submission to the Review, the Department addressed at length a question I posed on whether an adequate search has been made. It said that all department staff with any conceivable connection with the investigation into the oil spill were approached including file clerks, inspectors, engineers, secretaries and district and regional managers. A further search later, I am told, uncovered no more documents relevant to the application.

The Department provided one explanation of why some records which could be relevant were not under its “custody or control”. Under the **Environment Act**, the Department requires that oil spills be remedied to a specific level by qualified persons. The responsibility for compliance lies with the property owner. The Department requires remedial measures but does not require that copies of any consultant’s report be filed with it. Sometimes a property owner will pass the report to the Department but if this doesn’t happen, the Department does not compel the property owner or the consultant to do so.

Conclusions:

Section 20(1):

The Applicant bears the burden of proving that disclosing names of third parties would not be an unreasonable invasion of their personal privacy (see Section 45(2)).

The Nova Scotia Court of Appeal sets out steps for a public body to take before determining whether the disclosure of personal information would be a “reasonable” or

“unreasonable” invasion of personal privacy. (*Dickie v. Nova Scotia (Department of Health)* (1999) N.S.J. No. 116 NSCA). The first step is to determine if the information meets the definition of “personal information” found in **Section 3(1)(i)** of the *Act*.

After reviewing the severed information at issue in this review, I have concluded that only the names, addresses and telephone numbers of identifiable individuals constitute “personal information” pursuant to ss.3(1)(i). In one record, in particular, the Department severed financial figures under the personal privacy exemption. These figures do not constitute the “financial history” of identified individuals and should be disclosed.

The next step is to determine whether disclosing the information would constitute an unreasonable invasion of privacy. Sub-sections 20(3), 20(4) and 20(2) may have application. If ss.20(4) does not apply, and a factor or combination of factors from ss.20(2) and 20(3) do apply to the personal information, then disclosing it would be an unreasonable invasion of personal privacy unless the Applicant can prove otherwise.

I have considered whether disclosure of the names, addresses and telephone numbers severed from the records is presumed to be an unreasonable invasion of the personal privacy of that individual as contemplated by s.20(3) of the **Act**. It is my view, having reviewed the nine sub-sections of 20(3), that none of them apply. Turning to the balancing of the relevant factors to consider when determining if disclosure of the personal information would be an unreasonable invasion of a third party’s privacy, I have concluded that s.20(2)(a), (b) and (c) may have some relevancy. But, given the absence of any consideration of s.20(2) by the Department, I have

concluded that, on balance, disclosure of the personal information at issue would not be an unreasonable invasion of those individuals' personal privacy.

Despite that, it is my view that the names and other identifying information about the third parties are of little consequence to the Applicant's quest for records, I will not recommend that the severed personal information be disclosed.

Section 21(1):

The Department bears the burden of proving that s.21(1) applies (see **Section 45**). In order to satisfy itself that s.21(1) applies the Department's arguments must pass a three-way test.

The Department put forward no arguments in support of this exemption and I have seen no records to which it properly applies. Section 21(1), as noted above, calls for a three-way test. I have seen no evidence that disclosing the personal information could reasonably be expected to *significantly* harm the interests of a third party.

Documents not relevant to the application

The Ontario Information and Privacy Commission addressed the issue of relevancy of records in Order P-880:

...the need for an institution to determine which documents are relevant... is a fundamental first step in responding to a request... in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request one is really asking is whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe the term describes anything that is reasonably related to the request.

I disagree with the Department that two of the withheld documents are not relevant to the Application. The Applicant's request is for "all information" in the file. In my view the e-mail dated 8/5/99 and the letter dated October 5, 1999, are relevant and should have been considered for disclosure.

Adequate search:

While I am in no position to comment on the quality of records keeping within the Department, I am satisfied that those responsible for processing applications have done everything that could reasonably be expected of them to search for relevant records.

Recommendations:

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

- the e-mail dated 8/5/99; and
- the letter dated October 5, 1999 after removing the name and address of the intended recipient.
- the financial figures and volume measurements in the letter of March 13, 1997.

Dated at Halifax, Nova Scotia this 25th day of March, 2003.

Darce Fardy, Review Officer

