REPORT **FI-03-05**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **OFFICE OF ECONOMIC DEVELOPMENT** with respect to an application for access to documents related to Orenda Recip, a subsidiary of Magellan Aerospace Corporation.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **June 3rd, 2003**

ISSUE: Whether the exemptions under Sections 14(1), 20(1) and 21(1) support the decision of the Office of Economic Development to deny access to certain information regarding Orenda Recip and its contract with the Government.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, received January 30th, 2003, the Applicant asked that I review the decision of the Office of Economic Development (the OED) to deny access to the information he is seeking regarding the operations of Orenda Recip Inc. He also asked for a review of the fees charged.

Orenda Recip established an aircraft engine manufacturing plant at Debert after receiving financial assistance from the Federal and Nova Scotia Governments. This Province provided a $9.3 million royalty based loan. The plant wound down its operations in April of this year and the Province wrote off the $9.3 million.

The Applicant, in an application received by the OED on March 18th, 2002, asked for "all records related to any contracts signed with Orenda, Orenda Recip or Magellan (the parent company) related to the establishment of jobs at the Debert Industrial Park" including any cheques provided to any of the companies. He also asked for "any records related to evidence provided by the company or otherwise obtained by the province detailing whether it met or is meeting the obligations of any contributions".

The Application was later amended to:

- a copy of the SAP printout;
- a copy of all cheques forwarded to Orenda, together with copies of any letters accompanying the cheques;
- records related to "due diligence" by the OED; and
- records which evidence royalty payments to the OED.

After paying the estimated fee of $423.50, pursuant to Section 11 of the **Act** and section 6 of the Regulations, the Applicant was provided with copies of 32 cheques provided by the Province to Orenda, dated May 7th, 1997 to December 21st, 1999. He also received:

- edited letters from an OED official which accompanied the cheques;
- a two page briefing note to the Minister dated November 24th, 1997;
- a one page briefing note with information severed dated January 29th, 1998;
- a one page status report to the Minister also severed and dated May 13th, 1998;

- a three-page severed briefing note to the Minister dated November 30th, 2001; and
- a letter to Nova Scotia Business Inc. from the parent company Magellan dated November 5th, 2001.

The OED cited exemptions from disclosure under **Section 14(1)** (advice); **Section 20(1)** (protection of personal privacy); and **Section 21(1)** (confidential information of a third party). Section 20 is not an issue. The Applicant said he had no need to see names or other identifying information. The records which remain at issue are the two briefing notes and the status report dated January 29th, 1998, November 30th, 2001, and May 13th, 1998.

After mediation through the Review Office, the issues in dispute were identified and the OED was asked to comment on the following:

- the fee;
- the severed portions of the briefing notes;
- the severed portions of the status report; and
- the thoroughness of the search for relevant documents.

The OED responded in an 11-page submission to the Review Office:

The OED's submission:

The fee:

Section 11 of the Act allows fees to be charged for processing applications, providing copies of records, and shipping and handling. Section 6 of the Regulations contains the

fee structure. Effective April 2002, the fees were increased from $10.00 a half hour for processing to $15.00 a half hour. Twenty cents a page can be charged for copying.

In a letter dated March 28, 2002, the OED provided the Applicant with a fee estimate of $568.50, based on the fees applicable at that time. He was asked for a deposit of $284.25 and was told that once the record had been prepared "you will be required to pay the remaining charges before the record is released".

Subsequently, after discussions between the OED and the Applicant, the application was amended and a new fee estimate was provided.

In its decision letter to the Applicant dated January 28th, 2003, the OED provided a breakdown of the new fee estimate based on the fees established in April, 2002:

- for locating and retrieving: 2 hours at $30.00 an hour;
- for preparing the record for disclosure: 10 hours @ $30.00 an hour;
- for shipping and handling: $3.50 courier charges; and
- providing a copy of 300 pages @ 20-cents a page.

The Applicant paid the entire fee.

It is noted that while the first fee estimate was set before the fees were increased, the second estimate used the fee structure established in April, 2002. The Application was received when the original fees were in force.

The severing of the briefing notes and the status report:

With respect to s.21(1), the OED argues that the information severed meets all of the requirements of this section:

- the information would reveal commercial/financial information of the third party;
- the information was provided in confidence; and
- disclosing the information could reasonably be expected to do "significant" harm to the third party's competitive position and result in undue gain to another third party negotiating with the Government for another *Royalty Agreement*.

The OED believes disclosing the information to union employees and others would place Orenda at a disadvantage in any future negotiations.

The OED said that the third party was not consulted on the briefing notes and the status report because they were created by the OED. However, it said, some of the information in these documents was provided by Orenda in confidence.

The OED said it had intended to apply s.14 to the briefing note of January 29th, 1998 but conceded that because the record had been in existence for more than five years, s.14 no longer applied [see section 14(3)]. It decided to use its discretion and waive s.14(1) on the status report dated May 13th, 1998.

Advice to public body or minister

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.

> **(2)** The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.
>
> **(3)** Subsection (1) does not apply to information in a record that has been in existence for five or more years.

To support its decision to sever information from the briefing note of November 30th, 2001, the OED sought support from *Fuller v. the Queen* S.H. No. 184731A in which the Judge observed:

> [25] The intent of s. 14 is to protect from disclosure advice and recommendations developed within government.
>
> [26] There does not appear to be any judicial interpretation of s. 14 of the *FOIPOP Act* in Nova Scotia. In *John Weidlich v. Saskatchewan Power Corporation* (1997) Q.D.G. No. 834, the Saskatchewan Court of Queens Bench adopted a practical definition of "advice" as follows:
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> *[10] I suggest that the meaning of 'advice' in ordinary parlance is to be adopted here, meaning 'primarily the expression of counsel or opinion, favourable or unfavourable, as to action, but it may, chiefly in commercial usage, signify information or intelligence', per Rand, J.* , in **Moodie (J.R.) Co. v. Minister of National Revenue.** [1950] 2 D.L.R. 145 (S.C.C.), at p. 148.

[27] In *O'Connor v. Nova Scotia (Minister of the Priorities and Planning Secretariat (supra)* MacDonald, A.C.J. of the Nova Scotia Supreme court sitting as a Chambers Judge considered the meaning of "advice" in interpreting s.13(1).

[28] The Chambers Judge concluded that "advice is part of the deliberative process", and accepted the views of Commissioner Linden, the Ontario Commissioner in Order 118 that "advice" generally pertains to the submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process.

[29] The question in this case is whether the severed record for which a s.14 exemption is claimed is "advice, recommendations or draft regulations" and whether this information was directed to assisting the Executive Council to decide on a course of action respecting *FOIPOP* fees. If the answer to this is in the affirmative, then the document is exempt from disclosure under s.14.

The OED concluded that s.14(1) applies and s.14(2) (background information) does not.

The thoroughness of the search for documents:

The OED said it did a thorough search for relevant documents and points to the fact that a document overlooked in the initial search was found and processed by the OED.

The third party's submission:

The third party made its submission at the invitation of the Review Officer. I provided him, with the agreement of the OED, with a summary of the briefing note at issue. The third party agreed to the disclosure of some of the numbers denied by the OED and argued that disclosing the remainder would do significant harm to its negotiating position.

The third party confirmed the OED's assertion that the information belonging to the third party was provided to the OED in confidence. It provided the Review Officer with a copy of the agreement Orenda Recip Inc. signed with the Government which contained a clause stating that the information provided to the OED by the third party would be kept confidential.

The Applicant's submission:

The Applicant questions the fee because most of the documents he received were copies of cheques which should not have required any time to search or process. Beyond that, he said, he received seven to ten records.

He said that the fee should not have reflected any time spent by the OED familiarizing itself with the Orenda file, or searching documents because of poor record keeping.

It is clear from the documents provided to the Applicant that the severed information contains financial figures and the numbers of employees. The Applicant argues that

some of the figures have already been made public or are so old that disclosing them could do little harm to a third party.

Conclusions:

The fees:

The number of documents provided to an applicant does not necessarily reflect the number of documents that had to be reviewed. However, a public body must satisfy itself that, if records are not where they should be, the time spent looking for them will not be charged.

In any case, the second estimate, which the Applicant paid, should not have been charged with the new fee structure but with the structure that prevailed when the application was received.

Advice (s.14(1):

The OED in their submission cited *Fuller's* adoption of the meaning of "advice" from the Chambers Judge's decision in *O'Connor* (SH No. 165903, 2001 NSSC 6). But the Court of Appeal in *O'Connor* (CA 169637, 2001 NSCA 132) cited the same paragraphs from the Chambers Judge's decision and went on to say: (para 101)

> In my opinion, the Chambers Judge's general approach reflects the test as I have explained it, at least insofar as it addresses the proper focus of a s.13(1) inquiry. I do not intend my reasons to be taken as an endorsement of the judge's reflections on the meaning of "advice" or the distinction he cast between "advice" and "facts". (Emphasis added)

So one must be cautious in adopting the meaning of "advice" as set out in *Fuller* in light of the Court of Appeal's comments in *O'Connor.* Furthermore, even if the information

would reveal "advice" or "recommendations", the approach in *O'Connor* to s.13(1) would apply to s.14(1). If the information is found to reveal advice or recommendations under s.14(1) but meets the definition of "background information", it cannot be withheld.

Although the **Act** and the Regulations define "background information" they provide no definition for "advice".

In previous Reviews I have adopted definitions of "advice" used by the Alberta and Ontario Information and Privacy Commissioners. The Alberta Commissioner defined "advice" as an "opinion, view or judgement" (Order 97-007). The Ontario Commissioners accepted "thoughts" and "views" if they lead to a course of action.

The Nova Scotia Court of Appeal (in *McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288) said that words like "advice"should be given their "ordinary meaning". The Federal Court wants public bodies to "choose the interpretation that least infringes on the public right of access" (*Canada (Information Commissioner) v. Canada (Immigration and Refugee Board)*, 1997 F.C.J. No. 1812).

I have concluded that while the briefing note, dated November 30th, 2001, contains some "views" and "opinions" most of the information in them is factual and meets the definition of "background information" and must be disclosed.

Confidential Information: s.21(1)

With respect to s.21(1), a mandatory exemption, the OED claims it on portions of the status report and the two briefing notes. In my view the OED has not argued successfully that

disclosing the information denied under s.21(1) could reasonably be expected to do significant harm to the interests of the third party for two reasons: most of the figures are five years old, and the difficulties of Orenda are well known and documented. And while the third party may have expected the OED would keep all information private, the promise of confidentiality would have been accompanied by the codicil, "subject to applicable law". In this case an applicable law is this **Act**. These reasons, coupled with the importance of government being open and accountable, particularly when public funds are involved, lead me to conclude that all information denied under s.21(1) should be disclosed. In other Reviews I have concluded that a company doing business with the Government cannot expect important details of any agreement to be kept confidential. In fact public bodies are expected to advise companies seeking assistance, in writing, that any information they provide to the Government would be subject to this **Act**.

The thoroughness of the search for documents:

With no evidence to the contrary, I am satisfied that the OED did a thorough search for documents. If other documents appear, I would expect the OED to consider them with respect to this application.

Recommendations:

That the OED:

- Compute the $423.50 fee estimate to the fee charges that existed when the application was received and refund to the Applicant the difference.

- Disclose the figures found in the two briefing notes and the status report which were denied under s.21(1).
- With respect to the briefing note of November 30th, 2001, disclose:
  - all of the first page with the exception of the first sentence under "Current Situation"; and
  - all of the second page with the exception of the seven lines at the bottom of the page beginning with "Although Orenda...and ending on the top of the third page before the heading "Discussion".

Section 40 of the Act requires the OED to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of the decision.

Dated at Halifax, Nova Scotia this 3rd day of June, 2003.

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Darce Fardy, Review Officer