REPORT **FI-03-11**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **OFFICE OF ECONOMIC DEVELOPMENT** to deny access to information sought by the Applicant.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **June 10th, 2003**

ISSUE: Whether exemptions claimed by the OED under "advice", harm to the Government's interests, and harm to the financial or commercial interests of a third party support its decision to deny access to information with respect to its dealings with a cooperative wholesaler.

In a **Request for Review**, pursuant to the **Freedom of Information and Protection of Privacy Act,** dated January 29, 2003, the Applicant asked that I review the decision of the Office of Economic Development (the OED) to deny access to information related to the expansion of *Co-op Atlantic*, a co-operative wholesaler.

The Applicant asked specifically for:

> Records associated with the $8.2 million expansion of Co-op Atlantic, including a new meat-cutting facility, such records to include feasibility studies, ministerial briefing notes, correspondence among government agencies, contracts and related agreements, letters of agreement, letters of understanding, and economic impact projections.

The matter concerned the decision of the government to approve a loan to the company to expand its operations in Sydney.

In response the OED denied access in part to the records citing:

Section 13(1): advice to cabinet;
Section 14(1): advice to a minister;
Section 17(1): harm to the government's interests;
Section 20(1): unreasonable invasion of personal privacy; and
Section 21(1): reasonable expectation of significant harm to a third party.

Only seven records were identified to the Applicant as relevant to the application. These records were severed and portions of them were provided to the Applicant. However, an additional twelve records were provided to the Review Office as relevant. They were withheld in their entirety.

The Applicant's submission to the Review:

The Applicant submitted his arguments in favour of disclosure of more information. He did not take issue with s.20(1) but listed the matters of concern he has with the OED's response:

- "the excessive amount of time" taken by the OED to make a decision on his application;

- a lack of evidence that the OED "truly exercise(d) discretion" in denying information under discretionary exemptions;

- the number of exemptions cited. The Applicant called it a "scattergun approach" and said the OED should decide which single exemption is applicable in each case; and

- the deletion of the entire Communications Plan under the "advice" exemption.

The Applicant complained he had not been informed that 12 records were being denied in their entirety. And as of April, 2003, the Department had not laid out for him the specific exemptions cited on the 12 records.

The OED's submission to the Review:

The OED responded to the concerns of the Applicant in the order they were expressed.

The delay in responding:

The Application was dated September 25th, 2001. It was acknowledged in a letter dated October 26th, 2001, in which the OED said it was delaying its decision by another thirty days in accordance with **Section 9** of the **Act** which allows a public body to extend the time for making a decision on an application by thirty days (or longer with the permission of the Review Officer) under certain conditions: not enough detail was provided by the Applicant; a large number of records must be searched; or more time is needed to consult with third parties or other public bodies.

The letter of decision from the OED was dated January 20, 2003.

The OED understands the frustrations of the Applicant but said it had now overcome the problems it was having processing applications under the **Act** and, during 2002, was able to clear a serious backlog of applications.

The exercise of discretion:

In its submission to the Review, the OED set out to demonstrate how it used its discretion the way it was obliged in order to show it did not adopt a blanket policy to refuse to disclose the requested information. The OED explained at length how it reached its decision to invoke the exemptions under s.13, s.14 and s.17, by taking into consideration the purpose of the **Act** and by examining relevant court cases.

Use of more than one exemption:

The OED said that if a public body determines that more than one exemption may be applied to a certain document, then both can be claimed and the Review Officer can conclude if they apply.

The Communications Plan:

With respect to the "Communications Plan", found in Record #6, the severing of which was a specific complaint of the Applicant, the OED chose not to waive s.13 and s.14. Portions of it were denied as well under s.21(1). The OED cited decisions of the Nova Scotia Supreme Court and the Nova Scotia Court of Appeal. I will respond to this in my conclusions.

Section 21:

In accordance with **Section 22** of the **Act** three third parties were notified of the Application and asked for their comments. Only one third party raised objections. I invited that third party to make a further representation to the Review to develop its arguments with respect to harm. In its reply it referred me to the comments it had already made to the OED.

The OED said it considered all of the factors of Section 21(1) which reads :

> **21 (1)** The head of a public body shall refuse to disclose to an applicant information

> (a) that would reveal
>
> (i) trade secrets of a third party, or
> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) that is supplied, implicitly or explicitly, in confidence; and
>
> (c) the disclosure of which could reasonably be expected to
>
> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
> (iii) result in undue financial loss or gain to any person or organization, or
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

The OED recognized that a public body must satisfy a three-part test before claiming an exemption under this exemption. All three subsections, (a), (b) and (c), must apply.

The OED said it agreed with a third party representation that revealing the information would expose the third party to unfair financial harm because it would reveal confidential financial information. The third party believes the disclosure of its audited financial statements should be sufficient to meet the needs of this **Act**.

The OED concluded it was satisfied that it had met the three-part test by demonstrating that the information contains financial and commercial information of the third party, that the information was provided in confidence, and that disclosing the information would reasonably be expected to do significant harm to the interests of the third party.

On two documents, one titled "Advice to the Executive Council" (Record #3) and the other "Advice to the Executive Council - Briefing Note" (Record #5) the OED waived the

exemptions under s.13(1) and 14(1) and provided them to the Applicant with portions severed under the s.21(1) exemption.

Conclusions:

The OED has recognized the inordinate delay in responding to this Application in the time required by the **Act**. I raised this issue of delays in this Department publicly in my 2000-2001 Annual Report and privately with the Deputy Minister. Although the problems the OED (once known as the Department of Economic Development) had processing applications for access under the **Act** continued for some time, the Department finally acted to clear up a large backlog of applications and in my 2002 Annual Report I recognized this. Although the delay experienced by this Applicant is unacceptable, the OED has addressed the underlying problems and worked hard to resolve them.

I agree with the Applicant that it was incumbent on the OED to inform him that 12 more relevant documents existed even though they were denied in their entirety. **Section 7(1)(a)** requires a public body "to make every reasonable effort assist the applicant and to respond without delay to the applicant openly, accurately and completely". An applicant making a Request for Review should know how many relevant records are involved.

Exercise of Discretion:

While the OED's decision to cite several exemptions on a single document may indicate otherwise, I am satisfied that it exercised its discretion properly. While I take issue

with some of the exemptions cited by the OED, it is clear that it did not adopt a blanket policy in denying access under the discretionary exemptions, s.17, s.13 and s.14. I agree with the OED's submission that if the information in the records meets the conditions in the exemption, and if the OED has shown the process by which it exercised its discretion, the Review Officer cannot substitute his discretion for that of the public body.

Section 21(1) is mandatory exemption. **Section 45** applies in this situation and places the burden of proof on the OED to prove that disclosure would do the harm alleged. Although the OED agreed with the arguments of the third party, it is my view the third party's arguments are not convincing.

In reviewing the decision of the OED I will comment on each record by the numbers attached.

Record # 1- Schedule "A": In news releases from Moncton and Sydney on September 24th, 2001, Co-op Atlantic announced details of its decision to add a meat processing and distribution centre and extend its frozen food facility in Sydney. A similar news release can be found on the website of the Cape Breton Growth Fund. They revealed that Co-op Atlantic invested $3.7 million, the same amount that the Province lent the company on condition that 24 jobs are created. The Cape Breton Growth Fund would contribute $800,000 to all three phases of the project, conditional on the creation and maintenance of 60 jobs, which includes the 24. Similar information is denied the Applicant in Schedule A under s.21(1).

The news releases also revealed Co-op Atlantic had consolidated sales in excess of $478 million in the year 2000. If some of the information denied the Applicant can be gleaned

from news releases, it is difficult to assert that the same information provided the OED by the third party was done so with an understanding it would be kept confidential.

Part 3 of Schedule A contains information already made public through the Registry of Deeds. The OED should disclose it or tell the applicant where he can find it.

Record # 2 also contains information already public.

Record # 3, on which sections 13 and 14 were waived, also contains public information.

Record # 5, on which the "advice" exemptions were also waived, also contains information which was contained in the news release.

Record # 6: Given the information already made public by the company I am not satisfied that disclosing the information denied under s.21(1), would "reasonably be expected" to do "significant harm" to the interests of Co-op Atlantic. Absent any proof of harm it is my view that the OED should have noted *O'Connor v. Nova Scotia* (2001) NSCA, 132, in which the Court of Appeal observed that this **Act** imposes "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". The Appeal Court noted that this **Act** "is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in other provinces and territories".

I have expressed the view in other Reviews that the private sector, when asking for financial support from government, cannot expect that all of the information it provides to a public body to support its request would be kept private. In fact the contract signed by the parties explicitly says that "all documentation and information provided to the Province of Nova Scotia pursuant to the agreement is subject to the provisions of the Freedom of Information and Protection of Privacy Act".

With respect to s.13(1) and s.14(1), I am not convinced that all of Record # 6 contains "advice". Although the record bears the heading of "Advice to Executive Council" I refer the OED again to *O'Connor*:

> The description or heading attached to a document will not be determinative... There is no shortcut to inspecting the information for what it really is and then considering the required analysis under s.13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations. The Review Officer must always be wary of such traps before embarking on the necessary inquiry. (Emphasis added).

This record contains some "advice" but it also, in my view, includes "background information" containing "factual information" as defined in the Regulations: "a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts".

Record # 7: Again, some of the information denied in this record has already been made public.

The remaining 12 documents are denied under s.21(1) and s.17. Because they were all withheld from the Applicant in their entirety, I am not at liberty to provide details of their content except that they deal with financial projections and assumptions and other financial and commercial information.

Record # 8: I am satisfied that s.21(1) supports the decision to deny access to this eight-page document. I do not agree that s.17(1) can be used as an exemption because there is insufficient evidence that the interests of the government would be harmed if this record were disclosed.

Record # 9: The OED believes disclosing any part of this record would harm the financial interests of the company and provide financial gain to a competitor. Some of the information in this record can be found on the company's website. Other information in it has already been made public in the news release referred to above.

Record # 10: This record is denied under s.14(1) and s.21(1). The OED argues that this document contains advice to the head of a public body. My Review FI-02-84 dealt at length with this exemption:

> ".....I have adopted definitions of "advice" used by the Alberta and Ontario Information and Privacy Commissioners. Alberta's Commissioner defined it as "an opinion, view or judgement"based on the knowledge and experience of an individual and "expressed to assist the recipient whether to act and if so how. (Order 97-007)
>
> Ontario accepted "thoughts" and "views"if they lead to a course of action (Order M-457).
>
> In my view...."advice"should be interpreted in the way a reasonable person would understand the word to mean and, in my view that's what

> the Alberta and Ontario Commissioners have done. The Nova Scotia Court of Appeal said such words as "advice"should be given their "ordinary meaning" (*McLaughlin v. Halifax-Dartmouth Bridge Commission* (1993), 125 N.S.R. (2d) 288). The Federal Court has said that public bodies "must choose the interpretation that least infringes on the public's right of access" (*Canada (Information Commissioner) v. Canada (Immigration and Refugee Board),* [1997] F.C.J. No. 1812).

In my view this record does not contain "advice", and considering the purpose of this **Act**, some of the information in this document should be disclosed. The OED has not met the burden of proof to show how disclosing information from this document would significantly harm the interests of either the government or the company

Records # 11-15: These records were denied under s.21(1). There is no evidence the information in the records provided to the OED to create the records were provided in confidence.

Record # 19: Some of this information has already been made public in a news release dated September 24th, 2001. And parts of Schedule A in this record have already been disclosed to the Applicant.

Recommendations:

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

- from Record # 1, under Schedule "A", all of Part 1 Program and Financing), Part 2 (Terms of Repayment), Part 3 (Security) and Part 4 (Contingent Conditions).
- from Record # 2, the entire last section of the first page of the Memorandum;

- from Record # 3, (Advice to Executive Council) the entire page;
- from Record # 5, (Briefing Note) the entire record;
- from Record # 6 (Advice to Executive Council), from page 1, the first section from "Date" to the end of "Objective"; the first bullet, the third bullet with the exception of the first sentence, and the fourth bullet ;from page 2, the sections under "Audience"and the four bullets under "Key Messages".
- from Record # 7, (Report and Recommendation) on page 2, the first severed figure, the number of permanent positions; on page 3 the entire first and second paragraphs. With respect to Schedule "A", see first recommendation;
- from Record # 9, disclose in its entirety;
- from Record # 10, (Memorandum) on page 1, the second paragraph, except for the last sentence, the third paragraph except for the last sentence, and the second paragraph on the second page.
- from Record # 11, the first sentence and the five questions;
- from Record # 12, the entire e-mail;
- from Record #13, the final nine lines in the email starting "We have.." dated 3/7/01 and the entire record dated March 5, 2001;
- from Record # 14, the entire record;

- from Record # 15, the entire record;
- from Record # 19:
  - from the first document (Executive Summary): all of the first page with the exception of the final component; the second page with the exception of the recommendation;
  - from the second document (Proposal Summary)
    - page 1;
    - from page 2, the first paragraph and the two sections at the bottom of the page;
    - from page 5, the final section at the bottom of the page.

Section 40 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 10th day of June, 2003.

Darce Fardy, Review Officer