

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

**A REQUEST FOR REVIEW** of a decision of **NOVA SCOTIA BUSINESS INC.** to refuse to disclose portions of an economic impact report on a proposed call centre in New Glasgow.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** **June 26<sup>th</sup>, 2003**

**ISSUE:** Whether s.17(1) of the **Act** (harm to the financial or economic interests of a public body) supports the decision of NSBI to sever parts of the economic impact report.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated February 19, 2003, the Applicant asked that I review the decision of Nova Scotia Business Inc. (NSBI) to withhold parts of an economic impact report provided to NSBI by the Department of Finance.

On August 1, 2001, the former Department of Economic Development was asked for copies of all records associated with the setting up of a call centre in New Glasgow by a company named Convergys.

The Applicant was provided with copies of five records with parts severed under exemptions found in Section 12(1) (harm to intergovernmental relations); Section 13(1) (deliberations of the Executive Council); Section 14(1) (advice to a public body); Section 17(1)

(harm to the economic and financial interests of the government) and s.21(1) (harm to the interests of third parties).

In his Request for Review, the Applicant asked me to confine my review to the severing of an economic impact report done for NSBI by the Department of Finance. He also asked that I consider only those parts denied under **Section 17(1)**, a discretionary exemption. In its submissions, NSBI clarified it is relying on the following subsections of s.17(1):

**17 (1)** The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:

(b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

*The Applicant's Submission:*

In a submission to the Review, with reference to s.17(1), the Applicant said he failed to see how disclosing information about the impact of the call centre on provincial revenues could reasonably be expected to harm the financial or economic interests of the Government. He

said that this information was vital if citizens were to judge whether the Government received good value for the subsidy provided to the company. The Applicant wrote, “If the value of the subsidy substantially exceeds the expected revenues to the province, for example, then citizens may fairly ask whether the deal was a good one” (The Government assistance to the call centre was in the form of a payroll rebate).

The Applicant also asked that I consider two complaints he has with the process:

- the length of time it took NSBI to make a decision on the application; and
- his concern that NSBI may not have “used its discretion” when deciding to withhold information under the s.17(1) exemption.

*NSBI Submission:*

In my Review FI-03-11 I dealt with two of the points raised by this same Applicant - “the use of discretion” and the delay in making a decision. NSBI responded to those points for this Review as the Office of Economic Development did for the earlier review. I reach the same conclusions with respect to delay and the exercise of discretion in this Review as I did in FI-03-11.

With respect to s.17(1), NSBI made several arguments to support its decision to claim this exemption on the projected Provincial Government revenue (direct, spinoff, total):

- the projected revenue establishes the Government’s maximum negotiating limit for the payroll rebate;
- the information is financial information;
- it was used as the basis for the negotiations with the company;

- the information has consistently been treated by the Department of Economic Development as confidential information;
- disclosure of this information to the company would harm the Government's negotiating position as it would reveal to the company the maximum limit to which the Government may have been prepared to negotiate to attract the project;
- the information continues to be shielded from the company so as not to compromise the Government's on-going dealing with the company's New Glasgow project, or other company projects in Nova Scotia;
- the Government has an interest in shielding the information from the company's competitors or other potential call centre clients so as not to compromise future negotiations;
- it is critically important to shield the information from other provinces who are potential competitors for call centres. This information would reveal to other jurisdictions the negotiating limits and strategies of Nova Scotia; and
- the information has monetary value to Convergys and other "payroll rebate clients" as well as other jurisdictions and therefore s.17(1)(b) applies.

NSBI cited both s.17(1) and s.21(1) on some of the same severed parts.

**Confidential information**

**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.

NSBI claims that the figures produced by the Government in the economic impact report were supplied in confidence by the company. In explaining why it cited two exemptions on the same parts of the report, NSBI said disclosure would not only harm the Government's interests but the company's as well because it would reasonably be expected to result in undue financial loss to the company [s.21(1)] and undue financial gain to a competitor [s.17(1)(d)].

NSBI believes it lived up to its obligations under **Section 2** to be open and accountable when it:

- issued the Order in Council making public the total amount authorized for the payroll rebate;
- issued a news release providing the same information; and

- disclosed “a considerable” amount of other information in response to the application.

I noted above that the Applicant has asked me to review only those parts of the economic impact report that were denied under s.17(1). However, as noted, there are parts withheld under both s.17(1) and s.21(1). This means that if I conclude that the harm under s.17(1) has not been proven, I must consider s.21(1), a mandatory exemption, if I am to recommend the disclosure of those parts.

During the Review process I contacted the third party to ask for a submission with respect to those parts of the economic impact report denied under s.17(1) and s.21(1).

The third party has not seen the content of those parts denied under both exemptions, but NSBI described the information in a letter to the third party.

*The Third Party’s Submission:*

The third party:

maintains that all information regarding specific wage and salary data (including benefits) or information from which this could be derived, compensation philosophy and strategy, and operating expenditures, is information the disclosure of which would be of significant benefit to (our) competitors and which would accordingly provide (our) competitors with otherwise proprietary information... which they could use to their benefit, particularly in the development of their own compensation and incentive packages, and which would adversely affect (our) competitive position in the marketplace.

The third party also argues that the denied information contains trade secrets and financial information, that it was provided to NSBI in confidence, and that disclosure of it would do significant harm to its interests.

In the same submission, the third party said it has no objections to having some of its capital cost information disclosed, even though NSBI withheld it from the Applicant. Some of this information is included in a part of the report severed under both exemptions. The third party's concession means the denial of that particular part was then supported only by s.17(1) and in a subsequent submission, NSBI removed its objections to the disclosure of that part. These agreements are reflected in my recommendations.

**Conclusions:**

The question raised by the Applicant is an important one: 'Can a citizen make an informed judgement on the wisdom of the Government's decision to assist Convergys, on the basis of the information disclosed so far?'

The other important matters to consider are: 'Has NSBI successfully borne the burden of proof in its submission supporting the s.17(1) exemption?'; and 'Does the harm alleged outweigh the obligation placed on NSBI by **Section 2** of the **Act** to be "fully accountable" to the public "in order to facilitate informed public participation in policy formulation"?'.

The leading case for reference on "access to information" is *O'Connor v. Nova Scotia* NSCA 132 (2001). The Court of Appeal was attracted to the term "fully accountable" and noted that, "the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its

purpose an obligation both to ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to ‘necessary exemptions that are limited and specific’”.

The Court concluded that the Nova Scotia legislation, “is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada”.

NSBI must understand that it is obliged to ensure it is disclosing enough information to allow for informed judgement by the public. I am not satisfied it has done so in this case.

Figures withheld from the Applicant under s.17(1) included the projected Provincial Government Revenue (direct, spinoff, and total) on estimated capital and operating expenditures. One reason given by NSBI for severing these figures is that they would reveal to the third party information on the limits the Government was prepared to go in its negotiations with Convergys on the New Glasgow project. This would be harmful to the Government’s interests in negotiating future agreements with the company. Disclosure could also harm the Government’s interests in negotiating with other companies.

The view of the third party is that disclosing government revenue on its estimated annual operating expenditures would enable a competitor to derive other information which could harm the third party’s interests.

Further, NSBI said it was critically important to shield those figures from other provinces competing with Nova Scotia for call centres.



If disclosing government revenue figures would permit the calculation of the wage figures (Household Income), and thus cause harm to the interests of the third party, then this harm has already been done. In news releases dated July 26, 2001 and August 1 of the same year, NSBI revealed the predicted amount of Convergys' New Glasgow payroll by 2004 and the annual salaries of employees. This disclosure, in my view, undermines NSBI's submission that revealing Provincial Government revenue would reasonably be expected to result in undue financial loss or gain to the third party.

In addition, I'm not convinced that disclosure of these figures would expose the Province to a reasonable probability of significant harm to its interests.

It is my view that, on balance and in accordance with Section 2 of the **Act**, as well as the views of the Nova Scotia Court of Appeal, the revenue figures should be revealed.

**Recommendations:**

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

- the last two sentences under the heading "Capital Cost on page 2;
- the final bullet under the heading "Assumptions" on page 3; and
- all Provincial Government revenue figures on pages 4 and 5.

**Section 40** of the Act requires NSBI 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 26<sup>th</sup> day of June, 2003.

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Darce Fardy, Review Officer