

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

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF HEALTH** to disclose a summary of the approved budget of five nursing homes in the Province.

REVIEW OFFICER: Darce Fardy

REPORT DATE: July 16, 2003

ISSUE: Whether disclosing the financial information of five nursing homes would do significant harm to the interests of the operator. [Mandatory exemption: Section 21(1)]

In a Request for Review under the **Freedom of Information and Protection of Privacy Act**, dated April 24, 2003, a third party asked that I recommend the Department of Health (the Department) reverse its decision to disclose a summary of the approved budgets of the five nursing homes it operates.

The Department agreed to disclose the information in response to an application for access under the **Act**. An applicant had asked for the “draft budgets/financial plans of all nursing homes receiving government funding, and any other materials used in determining per diem rates” of each home.

The Department agreed to provide the applicant with

- a Long Term Care Memorandum, dated October 28, 2002, and
- copies of summaries of approved budgets, 2002-2003.

In accordance with **Section 22** of the **Act**, the Department notified the operators of the homes, as interested third parties, of its decision and offered them an opportunity to ask for a Review of that decision. Several objected to disclosure and requested a Review.

The Department's oral submission:

I received the Department's oral submission in a meeting with the officials involved in setting "per diem" rates at nursing care homes. I was told that the Department decided to disclose the approved budget in accordance with its obligations under **Section 2** of the **Act**. This section ensures that public bodies are open and accountable, particularly when public funds are involved. In this case the Department subsidizes 80% to 85% of the clients in nursing homes. According to the Department the third party, a "private for profit" nursing home operator, could not demonstrate harm to its financial or competitive positions because the homes have 99% occupancy and waiting lists. No operator, the Department said, could lose a competitive edge by the disclosure of their approved budgets.

The third party's case:

While the third party recognizes that the operation of nursing homes is not viewed as a competitive industry, it believes that since the introduction of "Single Entry Access" a few years ago, "the competitive landscape has changed." The third party explained:

"Residents and potential residents are required to make a choice of nursing home using (a) first, second and alternative choice process. Certainly price and quality is of paramount importance in the selection process. The homes that are chosen as first choice (based

on price and quality) are usually able to maintain their beds fully occupied. However, homes that are not able to be chosen as first or second homes (based on price and quality) have a much more difficult time keeping their beds occupied.”

The third party does not accept there is 99% occupancy in all nursing homes in the province but even if that were so it predicts this will not necessarily hold in the future. It claims New Brunswick has vacant beds and there is no guarantee the same situation will not apply in Nova Scotia. This, it believes, confirms it’s position that there is, or will be, competition between nursing home operators and that having the entire budgets disclosed could harm competitive positions.

The third party went on to argue that the release of its approved budgets will provide competitors, current and future, with complete information on the cost centres in their operation. “Once the marketplace understands our financial budgets our competitive advantage will be lost and could reasonably be expected to cause significant financial harm.”

The third party adds that other provinces are now requesting bids from the private sector and the disclosure of its profits on its Nova Scotia homes would give other bidders, as well as the other provinces, an advantage. The third party likens itself to “for profit” operators of schools in the Province and the profit margins of these companies have not been made public.

While discussing the possibility of severing profit figures, the third party believes the profit could be derived from other information in the budget. It said it would be satisfied with the disclosure of all but the financial figures related to “Revenue,” “Profit” and “Capital.”

The third party concluded that the Department's explicit assurance that its audited financial statements, which it is obliged to provide to the Department, would remain confidential, should be extended to the financial figures in the records at issue here because they are derived from the audited financial statements.

The Department's written submission:

After receiving the submission of the third party, I invited the Department to respond. It made the following points:

- Nursing home operators must disclose their audited financial statements to the Department. The Department, however, does not disclose those statements, because the information they contain belongs to the operators not to the Department.. What the Department intends to disclose is the financial information it uses "to demonstrate the mechanism for recognizing reasonable costs of nursing care" which it uses to derive the "per diem" rate.

- The "per diem" rates of nursing homes are public information, readily available. Details on profits and recoveries can be calculated, relatively easily, from the rates per client.

- With respect to the third party's claim that disclosing the information would harm its negotiating position with other provinces; the Department says every province uses a different system for subsidizing nursing homes and the information in the budgets at issue here would be of little assistance to them.

Conclusion:

The third party's case rests on Section 21(1), particularly the following subsections:

Confidential information

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

- (a) that would reveal
 - (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,
 - (iii) result in undue financial loss or gain to any person or organization.

All three subsections [(a),(b) and (c)] must apply in order for this mandatory exemption to stand. (*Atlantic Highways Corp. V. Nova Scotia* (1997) 162 N.S.R. (2d) 27).

Atlantic Highways and other Nova Scotia Supreme Court and Court of Appeal cases have paid particular attention to **Section 2(b)** of the **Act** which outlines its purpose to

- (i) facilitate informed public participation in policy formulation;
- (ii) ensure fairness in government decision-making;
- (iii) permit the airing and reconciliation of divergent views.

In my view it is important, and in the public interest, that the Department disclose how it arrives at the "per diem" rates.

Section 45(3)(b) of the **Act** places the burden of proof on the third party and this means the third party has to prove that the financial figures were provided in confidence, implicitly or explicitly, and that disclosing them would significantly harm its interests.

With respect to the “three-way test” imposed on third parties under s.21(1), while I am satisfied that the records contain financial information of the third party (though not all of the figures were provided by the third party), it is my view that the third party could not have expected this information to be held in confidence [subsection (b)], even though the audited financial statements were kept confidential, or that “significant harm” to the third party’s interests would follow the disclosure of the approved budgets [subsection (c)].

I have considered carefully the arguments of both the third party and the public body. I agree it would not be enough for the Department to disclose the “per diems” rates without revealing the figures it used in arriving at the rates. I have concluded that, in my view, the decision of the Department, in the interests of accountability to the public, should stand.

Recommendation

That the Department disclose the records at issue.

Section 40 requires the Department of Health to make a decision on this recommendation within 30 days of receiving this report and to notify the Applicant and the Review Officer of that decision.

Dated at Halifax, Nova Scotia this 16th day of July, 2003.

Darce Fardy, Review Officer