REPORT **FI-03-51**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF HEALTH** to deny access to copies of the agendas and minutes from Federal/Provincial/Territorial committee meetings respecting health matters.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **December 19, 2003**

ISSUE: Whether the Department has offered proof that disclosing information from the committee meetings could "reasonably be expected to harm" its relations with the other provinces and territories.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, (FOIPOP) dated August 5, 2003, the Applicant asked that I recommend to the Department of Health (the Department) that it disclose the records she has requested.

In the Application for Access, the Applicant asked for "the in-force inter-provincial/territorial reciprocal billing arrangements signed by the province," as well as copies of the agendas and minutes for two committees:

1. The Federal/Provincial/Territorial (F/P/T) co-ordinating committee on Genetics and Health; and

2. The Interprovincial Health Insurance Agreements Co-ordinating Committee.

The Applicant also asked for the minutes and agendas for meetings of Interprovincial and Territorial Medical Directors.

The records being sought were those created between January 1, 2000 and the date of the Application, May 15, 2003.

The Department provided the billing arrangements but denied the remainder of the application. During the mediation process with the Review Office, the Department agreed to disclose the names of Nova Scotia representatives on three inter-provincial/territorial committees. It also disclosed the dates of meetings of these committees for the years 2000 to 2003.

To support its decision to deny other information, the Department cited **Section 12(1)(a)** and **(b)** of the **Act**:

> 12(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to
>
> (a) harm the conduct by the Government of Nova Scotia of relations between the Government and any of the following agencies
>
> (i) the Government of Canada or a province of Canada . . .
>
> (b) reveal information received in confidence from a government . . . unless the government . . . consents to the disclosure or makes the information public.

The Department's submission:

S. 12(1)(a):

The Department said: "The disclosure of any information that would reveal the substance of the F/P/T committees' discussions could reasonably be expected to cause harm by:

- compromising the ability of the jurisdictions to reconcile positions and resolve issues of interest to all;
- impairing the ability of Nova Scotia to manage its policy changes; and
- potentially restrict the sharing of information, evidence and professional opinions".

S.12(1)(b)

The Department explained that the federal/provincial/territorial committees (F/T/P's) are "multi-jurisdictional":

> "The general objective of these committees is to share information and knowledge and provide alternatives and recommendations to decision makers regarding policy directions. The essential component of these deliberations is one of confidentiality since the members of these committees are not the final arbitrators of provincial and territorial health policy"

The Department continued that while fee schedules would be considered public information, "discussions about them are held in confidence, and any proposed changes would be considered to form part of the advice and recommendations given to the department's officials for further approval and/or implementation." It said the committee meetings are held under the "implicit principle of confidentiality."

The Department argued that it was bound by s.12(1)(b) to seek the consent of another jurisdiction before disclosing information received in confidence from that jurisdiction. It said that all jurisdictions were consulted and none consented.

The Applicant's submission:

The Applicant asked that I consider whether the records can be severed of information exempt under s.12 and the remainder provided. The Applicant also asked if I would share her view that there was a compelling public interest in disclosing all or any part of the requested records.

She also questioned the Department's assertion that meeting agendas contained confidential information.

Finally the Applicant said that through a similar request to the Ontario Ministry of Health, she received information in the minutes provided by the Ontario Medical Director. In that case, information in the minutes reflecting comments from participants from other provinces and territories were denied. At a minimum the Applicant thinks the Department should disclose the information in the minutes provided by its own representative(s) at the meetings.

Conclusions:

The public interest:

S.31(1)(b) of the **Act** allows a public body, with or without a request for access, to disclose information:

"The disclosure of which is . . . clearly in the public interest."

The Applicant did not explain why she felt the minutes contain information that is "clearly" in the public interest.

"Public interest" is not defined in the **Act**. In Review FI-00-29 I cited *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Disaster*)(1995) 2 S.C.R. 97 which supported an opinion of the Law Reform Commission. The Commission said "public interest" should be evident. "One will know one when one sees one." As examples the Commission cites "serious accusations of incompetence or venality in government," or a "serious breakdown in the implementation or administration of an established government policy."

In the same Review, I used several factors which I said should be considered in determining whether a matter is one of public interest:

- Has the matter been a subject of recent public debate?
- Would dissemination of the information yield a public benefit by assisting public understanding of an important public policy of service?
- Do the records show how the public body is allotting financial or other resources?
- Is the Applicant's primary purpose to disseminate information in a way that could reasonably be expected to benefit the public or to serve a private interest?
- Is the Applicant able to disseminate the information to the public?

The information in the records at issue here is not a good fit for any of the factors above. At the same time I am not convinced that the "public interest" bar needs to be set as high as the Law Reform Commission suggests.

While there is a certain public interest in what is discussed at F/P/T meetings, particularly when they are about health matters, minutes of meetings would not warrant a "public interest" override of the exemptions cited.

Section 12:

To satisfy the requirements of Section 12(1)(a) and (b), the burden is on the Department to show proof that:

- disclosing the agendas and minutes could reasonably be expected to harm the Government of Nova Scotia's relations with other provinces and territories; or
- that disclosure would reveal information received in confidence from another province or territory without their consent. [see **Section 45(1)**].

A recent decision of the Nova Scotia Court of Appeal with respect to **s.**12 is helpful. [*Chesal v. Attorney General of Nova Scotia, 2003 NSCA 124*, (20-11-03)]. The ruling stresses the importance of insisting that the party opposing disclosure present specific evidence of potential harm if the records are disclosed.

Justice Bateman began her analysis of the case by referring to *O'Connor v. Nova Scotia (Minister of Priorities and Planning Secretariat)* (2001) 197 N.S.J. No.360 which is recognized as the leading decision on the **FOIPOP Act**. In para 26, Justice Bateman said that principles found in *O'Connor* must guide the resolution of requests for disclosure under the Act. In para 57 of *O'Connor* Justice Saunders wrote:

> I conclude that the legislation in Nova Scotia 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 in Canada.

Justice Bateman agreed with *O'Connor* that exemptions under the FOIPOP Act, (including s.12) "are to be construed narrowly."

Justice Bateman also wrote that "Section 12(1)(a) of the **FOIPOP Act** does not establish a class exemption from disclosure of all information flowing between governments." She referred to a Federal Court of Appeal interpretation of a somewhat similar exemption (Section 15 of the Federal Information Act). In that case, which dealt with diplomatic notes, the Court said:

> "there is no presumption [in s.15(1)] that such notes contain information the disclosure of which could reasonably be expected to be injurious to the conduct of international relations. There must be evidence of this." (*Do-Ky et al. V. Canada (Ministers of Foreign Affairs and International Trade)* (1999), F.C.J. No. 673.)

Justice Bateman makes it clear that proof of the harm alleged is required. She explores definitions for "reasonable" and "expect" and concludes, as have other courts, that "the language of the statute requires that there be more than a mere probability of harm."

The Supreme Court of Canada has said the reasonable expectation of harm test requires "a clear and direct connection between the disclosure of specific information and the injury that is alleged." [*Lavigne v. Canada (Officer of the Commissioner of Official Languages)* (2002) S.C.J. No.55.] In *Chesal,* the Court of Appeal adopts "the same formulation for the evidence required to meet a reasonable expectation of harm" under the **FOIPOP Act**.

To paraphrase the Court, the effect of accepting the Department's arguments on s.12(1)(a) in this case, based as it on s.12, without evidence of specific harm, would be to create a blanket privilege for all information pertaining to federal/provincial/territorial meetings.

The Department, in its submission, predicts harm to the reconciling of positions and to Nova Scotia's ability to manage its policy changes, and that the sharing of information

would be restricted. But, in my view, it provides no convincing evidence that what it predicts will indeed happen. It provides, to paraphrase the *Lavigne*, no "clear and direct connection" between the disclosure of the records at issue and the harm alleged.

The Ontario Ministry of Health apparently did not share Nova Scotia's concern when it disclosed its own contribution to the meetings.

Section 12(1)(b):

With respect to clause (b), the British Columbia Information and Privacy Commissioner, in Order 361, provided factors to be considered when determining whether information was received in confidence. They include:

1. What is the nature of the information? Would a reasonable person regard it as confidential. Would it ordinarily be kept confidential by the supplier or recipient?

2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?

3. Was the record in question explicitly stated to be provided in confidence?

4. Was there an agreement or understanding between the parties that the information would be treated in confidence?

I am satisfied that some of the records in question contain confidential information and that confidentiality was expected by the participants. However, it seems to me the participants would not expect that even their attendance at the meetings would be kept confidential. The Department did not claim Section 20 (personal privacy protection) in refusing to disclose the names. In my view disclosing the names of those who attended the meetings would not be an unreasonable invasion of a third party's personal privacy.

While disclosing confidential information requires the consent of the other jurisdictions, there is no such constraint on the Department disclosing its own information.

Section 12(2) - need for consent of the cabinet:

Because the Department's own contributions to the meetings were not "received" from a government or agency listed in clause (a), and because it is also my view that there is a lack of evidence of harm to intergovernmental relations, I have reached the conclusion that s.12(2) does not apply to the Department's own information.

Summary:

- There is no proof of harm because the Department has not shown "a clear and direct connection" between the disclosure of the records and harm to inter-governmental relations s.12(1)(a);
- The refusal to disclose Nova Scotia's own contributions to the meetings cannot be supported by s.12(1)(b) because the information in those contributions was not "received" from another government or territory; and
- S.12(2) does not apply for the same reasons.

Recommendations:

(NOTE: The Department prepared a summary sheet of the records and broke them down into Points 2 and 3. Point 2 are records comprising the agenda and minutes of the F/P/T Co-ordinating Committee on Genetics and Health and the agenda and minutes of the Interprovincial Health Insurance Agreements Co-ordinating Committee; Point 3 are records of the agenda and minutes for the meetings of the Interprovincial and Territorial Medical Directors. My recommendations will refer to these points.)

That the Department disclose:

From the records which address point 2 of the application:

- from record #1, the first page;
- from record # 2, the first page and pages 5 and 6;
- from record # 3, the first page;
- from record #4, the first two pages as well as the last 3 pages of agendas;
- from record #5, the first 2 pages;
- from record #6, the first 2 pages;
- from record #7, the first two pages and the 2-page agenda at the end;
- from record #8, pages 1 and 2;
- from record #9, pages 1 and 2;
- all of record #10, (two pages);
- from record #11, the list of attendees;
- all of record #12, (one page);
- from record #13, the list of attendees;
- all of record #14, (two pages);
- from record #15, the list of attendees;
- all of record #16, (one page);
- from record #17, the list of attendees;
- all of record #18, (one page);

From Point 3:

- from record #1, (43 pages), the agenda, the list of attendees, and those parts contributed by the Nova Scotia representative with section headings. (The physician's name and address should be deleted on page 9);

- from record #2, (35 pages), those parts contributed by Nova Scotia with section headings included;

- from record #3, (104 pages), those parts contributed by the Nova Scotia representative, with section headings and questions included.

Section 40 of the Act requires the Department of Health 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 that decision.

Dated at Halifax, Nova Scotia this 19th day of December, 2003.

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Darce Fardy, Review Officer