

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

**A REQUEST FOR REVIEW** of a decision of **SERVICE NOVA SCOTIA AND MUNICIPAL RELATIONS** to deny access to records related to gas prices.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** **April 16, 2004**

**ISSUE:** Whether the denied information can be described as “advice” and is exempt from disclosure under **Section 14(1)** of the *FOIPOP Act*.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated November 27, 2003, the Applicant asked that the Review Officer recommend to Service Nova Scotia and Municipal Relations (SNSMR) that it reverse its decision to deny access to the information she is seeking.

The Applicant asked for copies of all internal studies and all correspondence regarding gas prices and the regulation of gas prices. She was provided with copies of some records, others were denied in their entirety and still others were denied in part. SNSMR explained that it was claiming an exemption under **Section 14(1)** of the **Act**.

S.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 a public body.

More information was disclosed during the Review Office's mediation process.

The Mediator prepared a numbered list of the records still at issue and asked the parties to prepare submissions to the Review Officer in support of their arguments.

*SNSMR's submission:* (The following numbers apply to the records numbered by the Mediator).

1. SNSMR believes the lone sentence severed from this record is clearly advice.

To support this opinion it cites [*Fuller v. the Queen* (2003) S.H. No. 184731(A)] in which the Supreme Court of Nova Scotia said "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.'"

2. This represents an e-mail which was denied in its entirety. SNSMR holds the view that the e-mail contains advice offered to assist the Executive Council or one of its committees to decide on a course of action.

3. SNSMR disclosed a briefing note titled "Actions to Ease Concerns About Gasoline Prices" after severing a part of it. SNSMR believes this record contains information designed to assist the decision making process of a public body.

4. During mediation, SNSMR disclosed the first sentence of this e-mail but maintains that the remainder of it is exempt because it is part of the "continuum of communications," the phrase used in *Fuller*.

5. SNSMR disclosed one sentence it had severed earlier from this record but holds that the remainder of the severed information contains an opinion which meets the definition of advice.

6. This record contains four pages titled “Regulated versus Deregulated Gasoline Prices.” Although during mediation SNSMR agreed to disclose a little more of the record, it cited *Fuller* for severing the rest: “(t)o determine whether a document is exempt from disclosure one must determine what information is being communicated in the document as well as to review the ‘periphery information’ including the identification of the parties to the communication, and the position they hold in Government.”

7. This document was originally disclosed with one line severed. During mediation, SNSMR agreed to unsever that part.

8. To support its decision to sever this e-mail, SNSMR cited an Order of the Ontario Information and Privacy Commissioner, who said “advice” generally pertains to a submission of a suggested course of action which will ultimately be accepted or rejected by the recipient during the deliberative process. (Order-118)

9. & 10. These records contain e-mails between Government officials about gas prices. SNSMR cited the same Ontario Order as above, as well as *Fuller*, to support its decision to sever these records.

11. This record was originally disclosed with one sentence severed. SNSMR decided to “unsever” this record and provide all of it to the Applicant.

12. On this document, SNSMR disclosed one originally severed portion and maintains its original view that the remainder is “advice.”

13. This is a briefing note on which SNSMR agreed to disclose some of the information it had originally denied the applicant, including the description of the “Issue” and several bullets under “Key Messages.” It continues to hold the view that denying the remaining severed portions is under s.14(1) supported by the previously cited Ontario Order and *Fuller*.

14. SNSMR released some previously denied parts of an e-mail but used the same arguments as above for declining to disclose the remainder.

15. & 16. SNSMR did not change its original decision on these two records - a Briefing Note and an e-mail.

*The Applicant’s submission:*

The Applicant addressed four of the records specifically:

- An update completed by a Department official regarding gas prices (record 6);
- A briefing note on gasoline and heating fuel prices, dated June 2001 (record 11);
- A note outlining Bill #48: Gasoline and Diesel Oil Fair-Marketing Practices Act (record 12); and
- Advice to Minister, dated February 21, 2001 (record 13).

The Applicant said it is her opinion that some of the severed material contains “background information” and that in accordance with s.14(2), it cannot be denied. She pointed out that definitions of “background,” found in **Section 3(1)**, include an “appraisal.” She provides the Oxford dictionary definition of an appraisal as a consideration of a situation so as to make a judgement. The Applicant believes much of the information fits that definition and should be

disclosed. In particular, she said, the information in document 6 is limited to background information detailing the benefits of gas price regulation.

The Applicant finds another definition of “background information” which she believes useful for her argument for disclosure: “a plan or proposal to establish a new program or to change a program, if the plan or proposal has been approved or rejected by the head of a public body.” She said that since the government has speculated about regulating gas prices and decided against it, the decision not to do so is a “rejected” plan and therefore fits the definition of “background information.”

The Applicant cites sub-section 13(2)(c) of the **Act** to further her cause for disclosure. Section 13(1) allows a public body to refuse to disclose information that would reveal the substance of deliberations of the Executive Council or any of its committees. The sub-section cited by the Applicant says s.13(1) does not apply to “background information in a record the purpose of which is to present explanations or analysis to the Executive Council or any of its committees . . . if the decision has been implemented.” The Applicant claims the information in documents 11, 12, and 13 relates to a decision that has already been made by the Executive Council, not to regulate gas prices.

**Conclusions:**

The Applicant provides the Oxford dictionary definition of an “appraisal.” However, in an Order in Council dated September 13, 2002, the Cabinet amended the *Freedom of Information and Protection of Privacy Regulations* which included definitions of words and expressions used in the definition of “background information” in s.3(1). Regulation 24(2)

defines “appraisal” as “a report prepared by a qualified appraiser that estimates the value of property or sets a price on an asset or liability.”

The documents at issue here do not contain information that meets that definition.

With respect to another of the Applicant’s arguments, the records provided to the Applicant confirm that discussions within Government included the regulation and deregulation of gas prices but there is no evidence that the Government had a plan to regulate gas prices and then rejected that plan.

Although the Applicant cites Section 13(2), SNSMR has not claimed this exemption. It rests its case on s.14(1) only.

In my Review, FI-03-45, in the absence of a definition of “advice” in this Act, I accepted a definition put forward by the Alberta and Ontario Information and Privacy Commissioners that advice can include opinions, views, and thoughts if they lead to a course of action. (Order 97-007, Alberta; Order M-457, Ontario). I am satisfied that the severed parts of the records meet the definition of advice contemplated in s.14(1).

While s.14(1) is a discretionary exemption which allows a public body to disclose such information if it chooses to, the Department showed evidence of using its discretion and decided not to disclose all of it.

**Recommendation:**

That Service Nova Scotia and Municipal Relations confirm its decision to the Applicant.

**Section 40** of the Act requires SNSMR 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. If a written decision is not received within 30 days, SNSMR is deemed to have refused to follow these recommendations.

**Dated** at Halifax, Nova Scotia this 16th day of April, 2004.

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Darce Fardy, Review Officer