REPORT **FI-03-62**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **NOVA SCOTIA GAMING CORPORATION** to disclose to an applicant information related to the operation of video lottery terminals in the Province.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **February 19, 2004**

ISSUE: Whether the information sought should be denied under Section 20(1) (protection of personal privacy) or Section 21(1), which protects the confidential information of third parties.

In separate Requests for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated December 1, and 8, 2003, two third parties asked that I recommend to the *Nova Scotia Gaming Corporation* (the NSGC) that it reverse its decision to disclose information related to their operations.

An Applicant had asked the NSGC to provide him with:

1. the names of every business in Nova Scotia licensed to operate a video lottery terminal (VLT) during the fiscal year ending March 31, 2003;

2. the number of VLT machines operated by each business in that same year; and

3. the total VLT revenue reported by each business during that period.

In accordance with **Section 22** of the **Act**, the NSGC contacted certain establishments, either through their representative associations or individually as third parties, to notify them of the Application and to ask what objections they had, if any, to disclosing the information. Subsequently, the NSGC informed all third parties that it had decided to disclose the information covered by the first and second parts of the Applicant's request. Two third parties objected and filed a Request for Review.

The NSGC's argument:

In its letter of decision the NSGC said it was required to provide that information to the Applicant because the information was already in the public domain and because disclosing it would not constitute "an unreasonable invasion of privacy."

The third parties' case:

One of the third parties, representing a number of the establishments, argued that it was a private organization and that access to their premises is not open to the general public. It also argued that the information disclosed would assist the criminal element and jeopardize the safety of those employees who make deposits of VLT revenues.

The second third party argued that the information which the NSGC intends to disclose contains personal and confidential information and that disclosing it would be harmful to its members' personal privacy. It said the information should be denied under Section **20(3)(f)** because it describes its assets directly and finances indirectly. It said it should also be refused under Section **21(1)(c)(i)** of the **Act** because disclosure would harm a member's competitive position and interfere with its negotiating position.

Conclusions:

Section 20 is a mandatory exemption which protects against the disclosure of personal information if it constitutes an unreasonable invasion of an individual's personal privacy.

"Personal information" is defined in Section 3(1)(i) as "recorded information about an identifiable individual." The information at issue in this review is not personal information as defined. It is information about business establishments not individuals.

Another mandatory exemption from disclosure can be found in **Section 21(1)(a)**, **(b)**, and **(c)**. However, in order for the exemption to stand all three sub-sections must apply. Section 45(3)(b) places the burden of proof on the third parties to prove that the information in question:

> (a) contains trade secrets or financial or commercial information;
>
> (b) was supplied to NSGC implicitly or explicitly in confidence; and
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> (c) disclosure would reasonably be expected to do significant harm to the interests of the third parties.

If just one of these conditions fails to apply, the exemption cannot be successfully cited. I have seen no evidence that the information which the NSGC intends to disclose was supplied to the NSGC, implicitly or explicitly, in confidence.

Although the failure of subsection (b) to apply is sufficient, I will address the issue of harm raised by one of the third parties. The Nova Scotia Court of Appeal concluded that

the legislators, in requiring "a reasonable expectation of harm," "must have intended that there be more than a possibility of harm to warrant refusal to disclose a record." (*Chesal v. Attorney General of Nova Scotia* (2003) NSCA 124). In *Chesal* Justice Bateman agreed with a view of the Federal Court that "there must be a clear and direct linkage between the disclosure of specific information and the harm alleged." *[Canada (Information Commissioner) v. Canada (Prime Minister)* (1993) F.C.R. 427].

I've heard no argument from the third parties that there would be a clear and distinct linkage between the disclosure and significant harm to the competitive position of the third parties. Consequently, I have concluded that s.21(1) does not support the position of the third parties.

Recommendation:

That the NSGC confirm its decision to disclose the names of the establishments and the number of VLT's each establishment had as of March 31, 2003.

Section 40 of the Act requires the NSGC to make a decision on this 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 February, 2004.

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Darce Fardy, Review Officer