REPORT **FI-04-02**

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 deny access to the individual video lottery terminal earnings of establishments that operate VLTs.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **April 14, 2004**

ISSUE: Whether **Section 20** (personal information) and **Section 21** (confidential information-evidence of harm) support the decision to refuse to disclose video lottery terminal revenues of individual VLT operators in the Province.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act** (FOIPOP), dated January 19, 2004, the Applicant asked that I recommend to the Nova Scotia Gaming Corporation (NSGC) that it disclose the information he is seeking.

In an Application, dated September 10, 2003, the Applicant asked the NSGC for:

- a list of every business in Nova Scotia licensed to operate a VLT during the year ended March 31, 2003;
- the number of VLTs operated by each business in that year; and
- the VLT revenues earned per business during that fiscal year.

Under the **FOIPOP Act**, the owners of the businesses are third parties and, in accordance with Section 22, the NSGC notified the third parties, either individually or through their representatives, to ask them if they consented to the disclosure of the information. Although most of the third parties who responded to the NSGC refused to consent to having any information provided to the Applicant, the NSGC decided to provide him with the list of businesses operating VLTs and the number of VLTs in each business. But the NSGC denied the individual VLT revenue.

In its November 21, 2003 decision letter, the NSGC told the Applicant that disclosing individual VLT revenues would be an unreasonable invasion of the personal privacy of the third parties and therefore must be denied under **Section 20** of the **Act**.

The NSGC consulted some 540 video lottery retailers in the province before responding to the Application. "While not determinative, the third parties' (retailers') views were a factor taken into account."

During the review process, the Review Office advised the NSGC that it should have considered **Section 21**, a mandatory exemption, which protects third parties from the disclosure of their confidential financial information under specific circumstances.

The Applicant's submission:

The Applicant believes that because gambling is an important social issue, the public has a right to know how much retailers with VLTs are relying on the income from those machines.

With respect to Section 21, the Applicant does not believe that disclosure would reasonably be expected to do significant financial harm to the businesses because the

government has decided on a finite number of VLTs for the province. A would be competitor, even knowing the revenues of a VLT operator in a particular area, could not set up a competing operation without a license. Each individual VLT must be authorized by the regulator, the Nova Scotia Alcohol and Gaming Authority (NSAGA).

The NSGC's submission:

With respect to the s.20 exemption, which protects against an unreasonable invasion of the personal privacy of an identifiable individual, the NSGC argued that the information sought contained "personal information," a condition of s.20, because "many retailers are not incorporated businesses but rather are sole proprietorships and/or clubs rather than commercial enterprises." It continued that because some of the retailers regarded their revenue as "personal information" the NSGC was required to refuse to disclose it.

With respect to s.21 the NSGC said that while it provides the individual retailers' revenues from VLTs in aggregate, it feels that disclosing the revenues individually would contravene that exemption. It argues that the individual revenues were provided to the NSGC in confidence and disclosing them would do significant harm to the interests of those whose revenues were disclosed.

The NSGC also commented on the Applicant's argument that disclosing the individual revenues would not encourage unfair competition because VLT operations were regulated. NSGC explained that there is finite number of VLTs which can be operated in Nova Scotia but not a finite number of retailers who can be licensed to operate them. Under the *Video Lottery Terminal Moratorium Act*, the maximum number of VLTs allowed to operate in the province is 3234. The determination as to who will become a VLT retailer and how many

VLTs will be located in each retailer establishment is determined by NSGC's operator, the Atlantic Lottery Corporation (ALC). In doing so, ALC considers a number of factors, including anticipated financial performance.

NSGC believes the third parties may be concerned that if their establishments are located in areas with high VLT player traffic, which would be demonstrated through the individual retailer's revenue information, competitors may choose to set up business in those areas. NSGC believes the retailers may also be concerned that ALC could, after seeing business cases presented by would-be competitors, remove some VLTs from current retail locations in favour of relocating them with a competitor.

Conclusions:

Section 20:

The first step to take, in considering an exemption under s.20 is to determine whether the information at issue is, in fact, "personal information." Section 3(i) of the **Act** gives us a definition: "Personal information means the recorded information of an identifiable individual." Examples include an individual's name, address or telephone number.

In my view, the financial information of the retail outlets that have VLTs, do not reveal the personal information of an identifiable individual. Section 20 does not apply.

Section 21:

In most circumstances, one would not question the right of a private enterprise, receiving no public financial support, to keep its revenues private. However, this case is somewhat different because, as already pointed out, VLT operations are regulated and gaming

in the province is the responsibility of the NSGC, a public body which, in accordance with Section 2 of the FOIPOP Act, must be fully accountable to the public. The NSGC was created under the *Gaming Control Act* as a Crown corporation "to carry out the business of gaming."

The Nova Scotia Supreme Court, in a recent ruling, cited an order by the British Columbia Information and Privacy Commissioner (Order 03-02 at para 34) in which the Commissioner noted the importance of looking back on the policy consideration that underlies provisions such as s.21(1) before examining third party cases. [NOTE: Section 21(1) of Nova Scotia's FOIPOP Act is almost identical to the British Columbia's s.21(1)] The Commissioner quotes from a report of the Williams Commission of Ontario (1980) which, before enactment of the Ontario legislation, addressed the question of third party business information:

> "Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes and to provide support services . . . to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should, as far as is practicable, form part of the public record."
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> [*Shannex Health Care Management Inc. v. The Attorney General of Nova Scotia representing the Nova Department of Health (*March 23, 2004) NSSC 054]

Section 21 is designed specifically to protect third parties (businesses) from the disclosure of their financial information if:

- the information contains financial or commercial information of the third party;
- the information was supplied by the third party to the public body, implicitly or explicitly, in confidence; and

- the disclosure could "reasonably be expected" to "harm significantly" the competitive position of the third party or result in "undue financial loss or gain to any person or organization."

If one of these conditions does not apply this exemption cannot stand.

Section 45 places the burden of proof on the NSGC to show a reasonable expectation that significant harm or undue financial loss would follow the disclosure of the individual revenues from VLTs.

I am satisfied that the information in dispute contains the financial information of the third parties. The second requirement, that the information was provided in confidence, also applies. However, NSGC must also prove that disclosure of the individual revenue figures "could reasonably be expected" to "harm significantly" the competitive positions of the third parties; or could reasonably be expected to result in "undue financial loss or gain to any person or organization."

In Review FI-03-62, involving the same public body, I cited an opinion of the Nova Scotia Court of Appeal 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 records." (*Chesal v. Attorney General of Nova Scotia* (2003) NSCA 124). Justice Bateman agreed with the opinion 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).

What these court decisions are talking about is the need for the party that is alleging harm if the records are disclosed, to provide clear evidence of the connection between

the disclosure and the harm. This could be done by way of providing examples to the Review Officer, real or hypothetical, but based on the facts of the review, of the harm that could reasonably be expected to occur if a specific piece of information is disclosed.

The only example I have been given is that the third parties might experience financial loss if competitors were able to find out that their VLT revenue was, realize that it was a lucrative location, and set up shop in their vicinity, and thus harm their competition position.

If other establishments were free to set up VLT operations wherever they chose, then a "clear and direct" linkage could be made between disclosure and significant harm. But this is not the case because would-be VLT operators need authorization. The disclosure of individual revenues would not be a factor to be considered because the individual revenues are known by the regulator. Thus there is no "direct linkage" between the disclosure of the individual revenues and significant harm to the competitive positions of those whose revenue was disclosed.

In my view the third requirement of s.21 has not been met and, therefore, Section 21 does not apply.

Recommendations:

That the NSGC disclose the individual revenues.

Section 40 of the Act requires the Nova Scotia Gaming Corporation 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, the Nova Scotia Gaming Corporation is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 14th day of April, 2004.

Darce Fardy, Review Officer