REPORT **FI-04-12**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF COMMUNITY SERVICES** to deny access to a breakdown of merit pay including the names of Department officials who received it and the amounts.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **April 21, 2004**

ISSUE: Whether disclosing the names of Department officials who received merit pay for the year 2002-03, and the amounts paid, would be an unreasonable invasion of their personal privacy under **Section 20** of the **Act**.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act** (FOIPOP), dated February 18, 2004, the Applicant asked that I recommend to the Department of Community Services (the Department) that it reverse its decision and provide him with the information he is seeking.

The Applicant had applied for access to:

1. A list of any pay bonuses that are available to senior officials and other non-union management staff of the Department;

2. An outline of the description of the conditions or criteria to be met for each of these bonuses;

3. A breakdown of the total costs to the Department for each of the bonuses in 2002-03; and

4. A breakdown of the costs of each type of bonus for each senior official and other non-union, management staff person in the Department for 2002-03.

The Applicant is satisfied with the information he received in response to the first three points.

The Department refused to provide the names of the officials who received "bonuses" and the "precise amount" each received. The Department told the Applicant that it made this decision to deny access after giving consideration "to other relevant circumstances as contemplated in Section 20(2) of the Act."

Although this was the only section of the **Act** cited in the Department's decision, it raised others in its submission:

Interpretation

3(1) In this Act

(i) "personal information" means recorded information about an identifiable individual including

(i) the individual's name, address or telephone number; and

(vii) information about the individual's educational, financial, criminal or employment history.

Personal information

20(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party's personal privacy, the head of a public body shall consider all the relevant circumstances, including whether

(a) the disclosure is desirable for the purpose of subjecting the activities of the Government of Nova Scotia or a public body to public scrutiny;

(b) the disclosure is likely to promote public health and safety or to promote the protection of the environment;

(c) the personal information is relevant to a fair determination of the applicant's rights;

(d) the disclosure will assist in researching the claims, disputes or grievances of aboriginal people;

(e) the third party will be exposed unfairly to financial or other harm;

(f) the personal information has been supplied in confidence;

(g) the personal information is likely to be inaccurate or unreliable; and

(h) the disclosure may unfairly damage the reputation of any person referred to in the record requested by the applicant.

(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if

(d) the personal information relates to employment or educational history; and

(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations.

(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(e) the information is about the third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff.

Burden of proof

> **45 (1)** At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.
>
> **(2)** Where the record or part that the applicant is refused access to contains personal information about a third party, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy.
>
> **(3)** At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
>
> > (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
> >
> > (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

The Department's submission:

The Department began its submission by differentiating between "at-risk pay," which it said was the subject of this Review, and "the only other form of an annual pay increase available to senior officials which is known as "merit" pay."

The Department provided the Review Officer with a document titled "MCP Pay for Performance Grid 2002-03," to assist it in explaining its opinion that the level of "at-risk" pay an employee receives is tied directly to the performance appraisal completed annually for each employee. The Department believes that by disclosing "at-risk" pay it would, in fact, be

revealing an employee's job performance rating and therefore it is exempt from disclosure under s.20(3)(g).

The Department also notes that the Applicant has not provided any reason to justify the release of at-risk pay information except to say that the release of this information is no different from the release of salary and travel information, which is publicly available.

In summary the Department confirmed its position "that the information denied the Applicant constitutes the personal information of employees relating to their employment history (Section 20(3)(d) of the **Act**) and further, that the information is directly reflective of personnel evaluations of employees, the release of which breaches Section 20(3)(g) of the **Act**." It continued that because the Applicant did not raise any public interest reason for wanting the information, there was no need to consider any of the relevant circumstances found in Section 20(2).

The Department cited the Nova Scotia Court of Appeal decision, *Dickie,* which it said laid down the "steps" to be followed when considering Section 20. According to the Department's interpretation of *Dickie,* the first step to take is to determine whether the information at issue meets the definition of "personal information" found in Section 3(1)(i) of the **Act**. The second step is to determine "whether the personal information falls within that class of personal information which is 'presumed' to be an unreasonable invasion of personal privacy" under s.20(3). The Department goes on to say that if that presumption is determined, then step three requires a public body to consider the relevant factors in s.20(2). [*Dickie v. Nova Scotia (Department of Health)* (1999) N.S.J. No. 116]

The British Columbia Information and Privacy Commissioner is quoted in

Dickie as agreeing that "employment history" includes information about an individual's work record. The Department believes this supports its position that revealing "at-risk" merit pay would, in fact, reveal a part of an employees "work record."

The Department also argued that s.20(4)(e) applies only to total remuneration figures and therefore does not apply in this case because the Applicant is seeking specific separate amounts.

The Department cited two cases which came before the Information and Privacy Commissioner of British Columbia. (*Order No. 139-1996 and Order No. 24-1994.)*

It cites, from Order 139-1996, a decision of the Commissioner who found that the contents of a performance appraisal do not come within the meaning of "position, function, or remuneration" of an employee of a public body.

From Order 24-1994, the Department finds that "the legislation in British Columbia allows for the publication of 'total' salaries and expenses, including 'severance' amounts but that severance amounts were not to be separated out." In the submission summary the Department said, "this case stands for two things: 1) British Columbia's legislation presumes the disclosure of portions of an employee's remuneration to be an unreasonable invasion of the employee's personal privacy, which presumption should not be rebutted unless the Applicant sustains an argument based on the public interest," and "2) the onus is on the Applicant to establish the basis of public interest."

The Applicant's submission:

The Applicant said he could not understand why the Department made a distinction between merit pay and annual salaries which are released in the Annual Supplement to the Public Accounts and can be found on the Government's website.

Referring to another Department which provided similar information, the Applicant said one Department should not interpret a mandatory exemption differently than another Department. He concluded "compensation is compensation whether it is for salary, travel or pay bonuses."

The Applicant finds the link which the Department established between disclosure of at-risk merit payments and personnel evaluations to be questionable "and not at all similar to seeing actual records containing written recommendations or evaluations." "Even if someone would go to this (performance) grid," he said, "I frankly wonder how much they would really know about the specific recommendations or evaluations."

With respect to the Department's claim that he has not established that public interest would be served with the disclosure of at-risk merit pay, the Applicant said the whole purpose of the **Act** is to ensure that public bodies are "fully accountable" to the public. "In addition," he said, "as Section 20(4) clearly indicates that the release of remuneration is not an unreasonable invasion of a third party's personal privacy, I would suggest the release of such information is part of making sure public bodies are fully accountable."

Summary of the Department's submission

- the information requested is the personal information of employees, relating to employment history [s.20(3)(d)];
- the information requested is directly reflective of personnel evaluations [s.20(3)(g)];
- s.20(4)(e) applies only to "total" remuneration figures; and

- the burden of proof is on the Applicant (s.45).

Summary of the Applicant's submission

- he disputes the link between the information requested and s.20(3)(g);
- he relies on s.2, the "fully accountable" clause;
- he disputes how s.20(4)(e) can be limited to total amounts since the Government already makes public a breakdown on salary and travel.

Conclusions:

I am not persuaded by the Applicant's argument that because one government department disclosed "bonuses" that all should. In fact I have spoken against "centralized decision making" on FOIPOP applications. I urged the Departments to make their own decisions based on their own interpretation of the legislation and to be prepared to support that decision during a review.

However, the Applicant's other arguments in support of disclosure carry considerable weight.

In its letter of decision, the Department should have elaborated on its reasons why Section 20(2), which is not in fact an exemption, was cited. The Supreme Court of Nova Scotia expects public bodies to "detail for the Applicant the reasons why the particular exemption is operative. Mere recital of the words of the relevant section is not enough." [*McCormick v. Nova Scotia (Attorney General)* (1993) N.S.J. No. 625 para. 4]

Section 20 of the **Act** obliges a public body to refuse to disclose personal information if disclosure would constitute an unreasonable invasion of the personal privacy of a third party. Subsections (3) and (4) offer examples of the kinds of information which, if

disclosed would or would not, constitute an unreasonable invasion of personal privacy. Subsection (2) provides circumstances to be considered when determining whether disclosure would be an unreasonable invasion of personal privacy.

In *Cyril House*, S.H. 160555, April 20, 2000, Justice Moir does not accept the interpretation put on *Dickie* by the Department of Justice lawyer representing the respondents in that case. Justice Moir said the first step is to determine whether the information in the records meets the definition of "personal information" found in Section 3(i). If it does then, as a second step, the public body should first consider s.20(4) and determine whether disclosure would not be an unreasonable invasion of personal privacy. If that is so, to use Justice Moir's words, "that is the end." He said, Section 20(4) does not create rebuttable presumptions. However, if the information does not fall under s.20(4) and if a public body determines that disclosing the information would be an unreasonable invasion of personal privacy under subsection (3), it must also consider the relevant circumstances in subsection (2).

It is clear from *Cyril House* that if the Review Officer should determine that Section 20(4) applies, there is no need for him to consider other subsections of s.20, and no need for the Applicant to offer a rebuttal. The personal information must be disclosed.

With respect to Order 139-1996 of the B.C. Commissioner, I agree with his conclusions that a performance appraisal does not come within the meaning of "position, function or remuneration" of a pubic servant. The Applicant, in this case, has not asked for a performance appraisal.

Order 24-1994, also cited by the Applicant, involved an application to the Ministry of Health for a list of severance packages provided by a hospital which closed. I do

not share the Department's view that the legislation in British Columbia, while allowing for the publication of total salaries and expenses, does not allow for the severance amounts to be separated out. Although severance pay amounts are not part of his Application, the Department believes Order 24-1994 confirms its view that disclosure of portions of an employee's remuneration would constitute an unreasonable invasion of personal privacy.

With respect, I do not agree. In the first place the Department, when referring to the separation of severances, is quoting from British Columbia's *Financial Information Act* not from the Province's Information and Privacy Act. One of the factors to be considered in the B.C. Information and Privacy Act [s.22(4)(g)] is whether the "public access to the information is provided under the *Financial Information Act.*" Although the Nova Scotia and British Columbia Information and Privacy Acts are quite similar, there is no such factor included in s.20(4) of the Nova Scotia Act. To quote the B.C. Commissioner in Order 24-1994, "I think that the Schedule of Remuneration and Expenses under the *Financial Information Transitional Regulation* must include payments that were part of a severance package, though they are not separated out from the total 'remuneration listed'." The separation of severance is a regulation under the B.C. *Financial Measures Act*, not a requirement of the B.C. *Information and Privacy Act*.

A more recent order of the British Columbia Commissioner's office (Order 02-56) is helpful. An applicant had requested, among other things records related to "current salary, bonuses, performance review report and any other benefits or contractual arrangements affecting the employment protocol" of the Executive Director of the Architectural Institute of British Columbia. The Institute claimed the information was exempt from disclosure because

the personal information relates to employment, occupational or educational history. [S.22(3)(d) of the B.C. Act - s.20(3)(d) of the N.S. Act] The adjudicator found that Section 22(4)(e), the equivalent of FOIPOP's s.20(4)(e), applied to public body employees' employment contracts, job descriptions, salary and benefit information which she ordered disclosed. She concluded that since she had found that s.22(4)(e) applied to the information she did not need to consider the other subsections. The adjudicator used the same approach as did Justice Moir in *Cyril House.*

Finally, there is nothing to support, in wording or in practice, the opinion of the Department that s.20(4)(e) applies only to "total" remuneration.

The FOIPOP Act does not define "remuneration." Black's Law dictionary defines it as a "reward," "recompense," or "salary." In my view, the "at-risk" merit pay to the MCP employees of the Department fits the definition of remuneration and therefore Section 20(4)(e) applies.

Recommendations:

That the Department disclose the breakdown of the merit pay to the Applicant.

Section 40 of the Act requires the Department of Community Services 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 Department of Community Services is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 21st day of April, 2004.

Darce Fardy, Review Officer