REPORT **FI-04-14**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF ENVIRONMENT AND LABOUR** to deny access to a record it claims to be privileged.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **May 10, 2004**

ISSUE: Whether **Section 16** (solicitor-client privilege) supports the Department's decision to deny an applicant a copy of a record related to public automobile insurance. Whether the Department can demonstrate it properly "exercised its discretion" in making its decision.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated February 26, 2004, the Applicant asked that I recommend to the Department of Environment and Labour (the Department) that it reverse its decision and disclose the record.

In an application to the Department, received September 2, 2003, the Applicant asked for copies of all information concerning public auto insurance and the North American Free Trade Agreement (NAFTA) for 2000-2003.

The Department replied that the only relevant record in its "custody and control" "is a legal briefing on this issue and this information has been denied under solicitor/client

privilege in keeping with Section 16 of the *Freedom of Information and Protection of Privacy Act.*" During the Review, the Department also cited Section 14, which allows a public body to refuse to disclose information containing advice to the Government.

Background:

Auto insurance comes within the purview of the Government's Financial Institutions Department which is a division of the Department of Environment and Labour. Auto insurance rates have been a matter of public debate in Nova Scotia and other provinces. It was the subject of discussion in the Legislature's "Sub-committee of the Whole House on Supply" on April 11, 2003. During that session, an opposition member questioned the Minister of Environment and Labour about a statement he had made earlier in the Legislature that he believed a public automobile insurance scheme was not possible under the terms of NAFTA.

The Minister, as recorded in Hansard, told the sub-committee that the government had been provided with an opinion to support what he told the Legislature. He said he expected that "we will probably make that document . . . available to the honourable member."

Mediation:

During mediation this Office encouraged the Department to show the Applicant the date of the opinion being withheld by the Department and it agreed to do so. It was dated May 12, 2003.

The Applicant's submission:

The Applicant argues that because the Minister revealed the opinion in the Legislature's sub-committee meeting, solicitor-client privilege cannot be attached to it. She finds support for this view in a Supreme Court of Canada case [*Solosky v. Canada* (1980), 105 D.L.R. (3d) 745, 758] which concluded that solicitor-client privilege applies where there has been:

- a communication between a client and a solicitor;
- which entails the seeking or giving or legal advice; and
- which is intended to be confidential by the parties.

The Applicant says that since the Minister revealed the opinion on NAFTA at the sub-committee meeting of April 11, 2003, the opinion lost its privilege because it was obviously not intended to be confidential.

She recognizes that the opinion is dated after the sub-committee meeting took place, but says she is no position to offer an explanation for that. The record at issue here, said the Applicant, appears to be the only "NAFTA" opinion that has been located and therefore must be the one the Minister referred to. The Applicant wants the Department to "use its discretion" to disclose the opinion.

The Applicant also puts a "public interest" value on disclosure. She says that the public should have access to the opinion expressed by the Minister because it is contrary to that of the former federal Minister of Intergovernmental Affairs and of the consultants hired by the New Brunswick All Party Committee on Public Auto Insurance.

With respect to the exemption claimed under s.14, the Applicant says the Department should have regarded the document in question as "background information"

because it's a "feasibility study." [**Section 14(2)** obliges a public body to disclose "background information used by a public body."]

The Department's submission:

The Department explains the solicitor-client relationship attached to this record. The client is the Superintendent of Financial Institutions. Although the solicitor, who gave the opinion, is employed by the Department of Justice, one of her clients is the Department of Environment and Labour. In this particular case she acted as the legal counsel for Financial Institutions. At the request of the Superintendent the solicitor provided a legal opinion on the impact of international trade agreements on the establishment of a public auto insurance scheme.

The Department believes it is clear that a solicitor-client relationship exists and therefore Section 16 applies.

It says it also claimed the s.14 exemption, because the record contains "advice" to the Government.

During the Review I asked the Department to address how it exercised its discretion in deciding to deny access to the solicitor's opinion.

In a separate submission, the Department said it recognized that s.16 is a discretionary exemption and it demonstrated how it used this discretion:

> "Once I had determined that the document was subject to s.16, I then reviewed the document for content and possible partial disclosure [ie: did the document contain background facts?]. Then I consulted with relevant legal, communications and policy staff within the department to determine their current view of this issue, receiving various verbal briefings regarding the matter."

The Department says it then contacted the applicant and asked for her reasons for concluding that disclosing the opinion would be in the public interest. The Department says it also researched various rulings, views and interpretations of the solicitor-client exemption and balanced "the impact on the public good in disclosing the document against the impact on the public good in not disclosing it."

Conclusions:

More support for the Applicant's view on confidentiality is found in *Solicitor-Client Privilege in Canadian Law*, (Manes and Silver) Butterworths Canada, 1993, p.10.

> "If the objective of privilege is to keep the communications confidential, it follows that the essential criteria for privilege must be confidentiality in their making and in their nature."

However, I have some difficulty with the Applicant's argument that the solicitor's opinion can no longer be privileged because the Minister had said, a month before the opinion at issue here was dated, that "(w)e do have an opinion." If the Minister was referring to a written opinion at that time, it is not the same written opinion which I have been provided with and the Department says the opinion being dealt within this Review is the only one it has. It cannot be said, in my view, that the Minister removed privilege from the May 12 opinion when he made the statement above on April 17.

In my view, the opinion can be exempted from disclosure under s.16.

The exercise of discretion:

The Applicant, in her submission, said she expected the Department to use its discretion with respect to s.16.

In Review, *FI-02-56*, I quoted from the Government of Alberta Manual, *Freedom of Information and Protection of Privacy, Guidelines and Practices:*

> "A public body must not replace the exercise of discretion with a blanket policy that certain types of information will not be released." (Government of Alberta, 2002, p.87.)

The Manual goes on to say that while there may be no need to address the harm that disclosure may cause "this may be a factor in exercising discretion." The guidelines do not make an exception for solicitor-client privilege.

In Review *FI-02-56*, I quote from an order of the Alberta Information and Privacy Commissioner (Order 2000-021):

> "The delegation of a discretionary power to a public body by the legislature under the Act gives a public body a degree of flexibility in the exercise of its delegated obligations . . . a (FOIPOP Administrator's) rationale for exercising his or her discretion in a particular way must be both demonstrable and reasonable."

In other Reviews I have adopted factors suggested by the Alberta Commissioner to be used by a public body when exercising its discretion.

- the general purpose of the Act, recognizing that the Nova Scotia FOIPOP Act obliges public bodies, **in Section 2**, to be "fully accountable" to the public. [See *O'Connor v. Nova Scotia* (2001) NSCA 132];
- the interests which the exemption attempts to balance;
- the nature of the record and the extent to which it is significant or sensitive to a public body;
- whether the disclosure of the information will increase public confidence in the operation of a public body; and
- whether there is a definite and compelling need to disclose the record.

In Review *FI-02-58,* I wrote that the legislature decided to make most exemptions to disclosure discretionary because it ". . . intended to give a public body some leeway in determining whether documents . . . should be withheld or disclosed."

In my view, the Department has demonstrated that it did not impose a "blanket exemption" and that it considered disclosing the opinion and exercised its discretion in a "demonstrable and reasonable" fashion.

While **Section 42(6)** of this **Act** does not allow the Supreme Court of Nova Scotia to substitute its discretion for the discretion of a public body, the same restriction is not imposed on oversight officers without the powers to issue orders. To quote from *Government Information: Access and Privacy*, McNairn and Woodbury (pg. 6-9), as I did in *FI-00-116*:

> "In those jurisdictions where the investigative approach is followed, the reviewing officer can properly address the question of whether discretion should have been exercised in favour of the requester. It would be perfectly appropriate for the report of the reviewing officer to recommend just such an exercise in discretion by a government or institution."

This view is confirmed by **Section 39(2)** of FOIPOP which allows the Review Officer to "make any recommendations with respect to the matter under review that the Review Officer considers appropriate."

That being said, after considering the factors above, I am not prepared to recommend that the Department reverse its decision on this application.

I see no need to consider the s.14 exemption claim.

Recommendations:

That the Department confirm in writing to the Applicant its original decision to deny disclosure.

Section 40 of the Act requires the Department of Environment and Labour 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 Environment and Labour is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 10th day of May, 2004.

Darce Fardy, Review Officer