

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

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF EDUCATION** to deny access to a list of the names of individuals in Nova Scotia with Certificates of Qualification in the construction electrician trade.

REVIEW OFFICER: Darce Fardy

REPORT DATE: **July 16, 2004**

ISSUE: Whether **Section 20** of the **Act** supports the decision of the Department of Education to refuse to disclose the information requested.

In a Request for Review under the **Nova Scotia Freedom of Information and Protection of Privacy Act (FOIPOP Act)**, dated March 15, 2004, the Applicant asked that I recommend the disclosure of the names of those on the current list of people who have certificates of qualification for the construction electrician trade in Nova Scotia.

The original application was made to the Department of Environment and Labour and transferred to the Department of Education (the Department) which had custody and control of the list.

The Department refused to comply with the application claiming disclosing the names would constitute an unreasonable invasion of the personal privacy of third parties and

therefore the information is exempt from disclosure under **Section 20** of the **Act**. In its letter of decision to the Applicant the Department cited specific sub-sections of s.20:

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 sub-section (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

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

(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.

During this Office's mediation stage, the Department and the Applicant agreed to exchange the submissions they made to the Review Office in support of their positions, and to offer rebuttals.

At a review of a decision to refuse access to information containing the personal information of 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. [**Section 45(2)**].

Section 20 is a mandatory exemption under the **Act**. A public body **shall** refuse to disclose personal information of a third party if this constitutes an unreasonable invasion of the personal privacy of the third party. The Section contains three sub-sections. Sub-section 20(4) sets out circumstances which are not to be considered unreasonable invasions. Sub-section 20(3)

sets out circumstances which are presumed to be unreasonable invasions of privacy. And sub-section 20(2) contains relevant circumstances to be considered if sub-section 20(4) does not apply.

The Applicant's submission through his solicitor:

The Applicant argues that the information falls under sub-section 20(4)(h) and that, therefore, disclosing the names would not be an unreasonable invasion of privacy.

20(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if

(h) the disclosure reveals details of a licence, permit, or other similar discretionary benefit granted to the third party by a public body, not including personal information supplied in support of the request for the benefit.

The Applicant cites s.20 and s.21 of the *Apprenticeship and Trades Qualifications Act (Apprenticeship Act)* to support his assertion that "certificates of qualification" are discretionary benefits.

Certificate of apprenticeship

20 Subject to the regulations, the Director shall issue a certificate of apprenticeship in a designated trade to a person who, in the opinion of the Director, has successfully completed the apprenticeship training and related certification examination.

Certificate of qualification

21(1) Subject to the regulations, the Director shall issue a certificate of qualification in a designated trade to a person who

(a) holds a certificate of apprenticeship; or

(b) in the opinion of the Director, otherwise meets the standards and requirements established for the trade and has successfully completed the related certification examination.

He also cites Sections 29 and 30 of the Apprenticeship Act Regulations. Sub-section 29(2) reads:

29(2) For the purpose of Section 21 of the Act, an apprentice has successfully completed a certification examination if the apprentice has attained a grade of 70% or higher on the certification examination, or a grade that the Director considers satisfactory on the practical examination, if any, for the designated trade.

Section 30(1), he argues, also confirms that a certification of qualification is a discretionary benefit: “The Director may issue a certification of qualification . . .”(emphasis in the above added by the Applicant).

The Applicant says he is clearly seeking “details of a license, permit or other similar discretionary benefit” because the individual names asked for are “details” of the permit.

The submission concludes that terms such as “in the opinion of” and “may,” “clearly convey that the Director retains discretion to issue the certificates according to the provisions of the (Apprenticeship) Act.” “(W)hile the Ministry may be able to argue that other information, such as certification examination results, were supplied in confidence, there is no basis to argue that an individual’s status as a certified construction electrician or apprentice can be held in confidence. By doing so, the Ministry would be defeating the purpose of the (Apprenticeship) Act it is seeking to apply.”

The Applicant also rejects the Department’s argument that the information sought contains “employment history.” He finds support in my Review Report FI-02-84 in which I adopted the view that the term applies to past employment and not to aspects of current employment. In the same Review I cited *Dickie v. Nova Scotia (Department of Health)*, [1999], N.S.J. No.116 (NSCA) in which the judge said that the words “employment history and the

context in which they are used in the Act suggest that the ordinary meaning of the words in the employment context is intended.”

The Department’s submission:

Ss.20(4)(h): The Department does not accept the Applicant’s view of s.20(4)(h). It said this clause “presupposes that the applicant has identified the individual(s) about whom he or she is seeking the details of the license. It is not a provision that places an onus on a public body to identify all those who hold a particular license.”

It cited *Gatemaster Inc. v. Nova Scotia (Department of Housing and Municipal Affairs)*, [2000] N.S.J. No. 55 (N.S.S.C) which concluded that “providing a list of commercial property owners and their addresses would be a violation of their personal privacy.” It also referred to a decision in *Cyril House and 1444900 Canada Inc. (Abacus Security Consultants and Investigators)* [2000] unreported S.H. 160555 (N.S.S.C.) in which Justice Moir ruled that “disclosure of the names and addresses corresponding to license plate numbers would be an unreasonable invasion of personal privacy.”

The Apprenticeship and Trades Qualification Act: The Department also rejects the view of the Applicant that the issuing of certificates is discretionary. It draws attention to the wording of Section 21(1) which reads “the Director shall issue a Certificate of Qualification.” The Department explained that the Director uses her or his discretion, for example, for people who “have been working in the field for some time and . . . did not enter into an apprenticeship agreement.” The Department agreed that the Regulation may indicate some discretion “but in practice it is not discretionary in any way, and no examples of discretionary decisions could be identified in our collective corporate memory.”

Ss.20(3)(d): The Department believes the information requested relates to “employment and educational history.” “The fact that an individual has passed the certification requirements to be an electrician is information that effectively discloses their educational history and indicates that the person is likely employed in the field.”

Ss.20(3)(i): In its submission the Department introduced an exemption it had not cited in its letters of decision. Given that the Applicant had an opportunity to address this late exemption I will consider it. Sub-section 20(3)(i) specifies that disclosing personal information would be an unreasonable invasion of personal privacy if the information “is to be used for mailing lists or solicitations.” Knowing the names of the apprentices, said the Department, would enable the Applicant “to find the full contact information on an individual.” It added that it received no assurances from the Applicant “that the information was not going to be used for the purposes of mailing lists or solicitation.”

Ss.20(2)(f): With respect to sub-section 20(2)(f), the Department said that while apprenticeship candidates are not routinely advised that their personal information could be requested, they would understand that the FOIPOP Act applies and would expect their personal information to be kept confidential.

The Department also took issue with the claim of the Applicant that if the public cannot acquire a list of certified electricians then it is unable to obtain assurance of competence and quality. It said that it is the custom and past practice of the Department, “in response to an inquiry about a named individual” to confirm whether that individual has a certificate of qualification.

The Department concluded its submission with the statement that in a majority of cases, the Information Commissioners of Ontario, British Columbia and Alberta have found reason not to disclose such lists as that requested by this Applicant.

Further submission of Applicant:

Ss.20(4)(h): The Applicant maintains that this sub-section “explicitly provides that (disclosing) details of a licence, permit or other discretionary benefit provided by a public body to a third party are presumed not to be an unreasonable invasion of personal privacy.” He says “there is no authority for the proposition made by the Department of Education that this provision ‘presupposes that the applicant has identified the individual(s) about whom he or she is seeking details of the licence’.”

The Applicant also cites the same Nova Scotia Supreme Court case, *Cyril House*, as the Department, but reaches a different conclusion. He provides an extensive quote from Justice Moir who described ss. 20(4)(h) this way:

[10] ... The provision contemplates the release of some personal information. What good would come of revealing the details of a benefit granted to someone by government without revealing the person’s name? I think this provision has in mind one aspect particularly of the complex statement of purpose supplied by section 2. It includes s.2(b)(ii), “to provide for the disclosure of all government information . . . in order . . . to ensure fairness in government decision-making.” With that aspect of the purpose prominent, one sees that s.20(4)(h) is concerned with disclosure of who has received government benefits, among the other details of the benefits granted. Whatever the person said of themselves in support of an application for the benefit might be protected by the ‘not including’ clause, but the identity of the recipient would be part of the “details” of the benefit (emphasis added by the applicant).

Referring to the use of the word “shall” in s.21(1) of the *Apprenticeship Act* the Applicant said that when the provisions of that section are read as a whole it is clear that the certificates remain discretionary and are not simply granted as a matter of right. “The breadth of this discretion is further emphasized in section 29(2) of the Regulations, which entitles the Director to designate the grade that is satisfactory for certification purposes.”

The Applicant argues that the two cases cited by the Department, *Gatemaster* and *Cyril House*, involve different issues than the one dealt with in this case: In *Gatemaster*, he said, ss.20(4)(h) of the **FOIPOP Act** was not considered and “the Court did not refuse (the disclosure) of the information based on a presumption of an invasion of privacy.” The court found, instead, that “the Act did not apply because the information sought was already part of the public record.” In *Cyril House*, the issue, he said, is also significantly different because in that case a private investigator was seeking to obtain the name and address linked to a specific licence plate not a list of names. The court noted the registration of vehicles and the display of license plates are compulsory and there was sworn evidence that the Registrar treats the information supplied on an application for a vehicle permit as confidential.

Ss.20(3)(d): The Applicant maintains that this sub-section cannot stand because the Department, by its own written admission, “has a custom and past practice of disclosing, in response to an inquiry about a named individual, whether or not a named individual is in possession of a current certificate of qualification in a trade.”

The Applicant argues that by providing the personal information of apprentices on request, the Department is acknowledging that the information does not contain employment or educational history. Otherwise, he said, the Department would be providing the information

in violation of the **FOIPOP Act**. Besides, said the Applicant, “(no) information is being sought on the training or employment history of the individuals in question.”

Ss.20(2)(f): The Applicant says the information sought could not have been supplied in confidence because the Department discloses the information on request.

Ss.20(3)(i): The Applicant says the language in this provision requires that the personal information consist of “the third party’s name, together with the third party’s address and telephone number.” (Emphasis added by the Applicant). This application is for names only. The Applicant doesn’t agree that *Gatmaster* applies in this case because it was dealing with an application for names and addresses of the owners of apartment buildings.

Finally, the Applicant took issue with the Department’s view that “in the majority of cases dealing with the issue, Information and Privacy Commissioners have found reason not to disclose such lists.” He cited *Noel v. Great Lakes Pilotage Authority Ltd.*, [1988] 2 F.C. 77 (T.D.) in which “the Federal Court ordered that a list of names be provided disclosing those individuals who held a certificate or had otherwise been granted the authority to operate ships notwithstanding the compulsory pilotage requirements set out by statute.”

The Applicant cited like decisions of the Federal Court in *Van Den Bergh v. Canada (National Research Council)*, [2003] FC 1116 (T.D.) and *Geophysical Service Inc. v. Canada-Newfoundland Offshore Petroleum Board*, [2003] FCT 507 where names were ordered released. He also cited the Alberta Information Commissioner who ordered the disclosure of a list of names of Alberta residents who received a licence to hunt grizzly bears during the 1998 hunting seasons [*Re Alberta (Environmental Protection)*, [1999] A.I.P.C.D. No. 1].

Conclusions:

In interpreting the application of Section 20 of the FOIPOP Act I am guided by *Cyril House*, the same case cited by both parties to this Review. Justice Moir provided the steps that need to be taken when determining if s.20 and any of its sub-sections apply:

1. The public body must be satisfied that the information requested meets the definition of “personal information” found in Section **3(1)** of the **FOIPOP Act**?
2. If so, a public body must first consider ss.20(4). If it is found that this sub-section applies, there is no need to consider sub-sections (3) or (2). If (4) applies the information cannot be refused because that sub-section does not create rebuttable presumptions.
3. If the information does not fall under (4) and if a public body determines that sub-section (3) applies and that disclosure of the personal information would be an unreasonable invasion of privacy, then the relevant circumstances in sub-section 20(2) must be considered.
4. If ss.20(3) does not apply, the public body must consider ss.20(1).

There is no question, nor is it in dispute among the parties, that the names of the individuals meet the definition of “personal information” in s.3(1).

In line with *Cyril House* I must now consider whether to accept the position of the Department or the Applicant on whether an electrical trades certificate is a discretionary benefit and therefore falls under s.20(4)(h). It’s noted that this sub-section considers a “licence” a discretionary benefit. Merriam-Webster defines “licence” as “permission to act” and “a permission granted by competent authority to engage in a business or occupation otherwise unlawful.” I have concluded that a certificate of qualification is a licence because it grants individuals permission to engage in electrical construction. I agree with the Applicant that,

despite the use of the mandatory word “shall” the “competent authority” is not obliged to grant a certificate. It is clear the *Apprenticeship Act* gives the Director the discretion to grant or not grant a certificate. In fact the Department’s submission acknowledges this.

Coupling this with the assertion in *Cyril House* that revealing such details without revealing the names of those who are granted a certificate would be of little value, I am satisfied that disclosing the names of the certificate holders would not be an unreasonable invasion of their privacy in accordance with ss.20(4)(h). The Applicant has successfully borne the burden of proof required in s.45(2).

While there is now no need for me to address the other exemptions cited it may be useful to the parties if I were to share my conclusions on those exemptions as well.

With respect to ss.20(2)(f), the Department provided no evidence to show that the certificate holders expected their names to be held in confidence. Usually successful trade apprentices want it known that they have been successful in acquiring a certificate.

The argument that the names alone provide educational or employment history [ss.20(3)(d)] is not sustained. In fact the Department admits it provides the educational histories of certificate holders on request.

I agree with the Applicant that ss. 20(3)(i) does not apply because the request for names must be accompanied by a request for addresses and telephone numbers and proof that the information is to be used for mailing lists or solicitations by telephone or other means.

Recommendations:

That the Department disclose to the Applicant the names of the current certificate holders.

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

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

Darce Fardy, Review Officer