REPORT **FI-04-44**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the **NOVA SCOTIA PUBLIC SERVICE COMMISSION** to sever, in whole or in part, the results of public opinion polling.

REVIEW OFFICER: Darce Fardy

REPORT DATE: November 2, 2004

ISSUE: Whether the disclosure of records containing polling results and other data could reasonably be expected to harm the financial or economic interests of the Government and are exempt from disclosure under Section 17 of the **Act**.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, the Applicant asked that I recommend to the Public Service Commission (PSC) that it disclose all of the records it holds on polling data for certain years.

The Applicant asked for

> "A copy of any and all public opinion research, polling and any related material for 2002, 2003 and 2004 . . . This should include contracts."

The Application named four research and polling firms but this was later clarified and reduced to one firm.

In its letter of decision PSC told the Applicant that the request was partly granted and some records were disclosed. The remainder was denied under exemptions found in **Section 17(1)**, **(1)(c)** and **(1)(e)**.

> **17 (1)** The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> > (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
> >
> > (e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

PSC's submission:

The PSC's submission dealt at length on its role as adviser to the Executive Council on collective bargaining in the public sector. It explained that collective bargaining in the public service is cyclical. Currently the Nova Scotia Government is actively bargaining with a number of its bargaining units. Fifty-eight collective agreements in the continuing care sector expired while this Review was being prepared and more will expire within a few months. According to the PSC the records denied to the Applicant "contain sensitive information that would adversely impact the bargaining position of the Government in these negotiations."

It says:

> "[t]he sensitive information is contained in both the questions and the responses in the opinion polls. Both the questions and answers can be indicative or interpreted as indicative of the Government's focus and strategy in negotiations. It is the firm view of the Government that revealing this information will weaken its bargaining position which, in turn, will lead to the kind of harm to the economic and financial interests of Government contemplated by the exemption set out in s.17(1) of the Act."

The PSC recognizes that "public opinion polls" are defined in the Act as *background information* [s.3(1)(a)(ii)] and cannot be regarded as exempt. But it said this applies only to **Sections 13** (cabinet deliberations) and **14** (advice to public body or minister) where background information is specifically mentioned and applies to background information used by a public body. The phrase is not mentioned in s.17. It is clear from this, said the PSC, that the legislators contemplated that a release of the results of opinion polls in certain circumstances could reasonably be expected to cause harm to the government's financial and economic interests. The PSC contends that the collective bargaining process is such a circumstance.

The Applicant's submission:

The Applicant takes issue with the PSC's position on "background information" and says it is clear that "the intent of the Act is to disclose background information except in particular circumstances." Disclosing the polling information as *background information*, according to the Applicant, is in line with the overall intent of the Act as described by the Nova Scotia Court of Appeal in *O'Connor v. Nova Scotia* 2001 NSCA #132 which notes that public bodies are required to be "fully accountable"to the public.

The Applicant said that polling data is neither secret nor exclusive in nature.

> Public opinion polling is used to measure "public" opinion. Over 10,000 attempts were made in the combined 2002 and 2004 surveys to contact Nova Scotians. Of these 1,277 contacts were cooperative and we can assume they made it through the entire survey. The questions in the public opinion survey were not deemed too sensitive to harm the financial interests of the government (17)(1), too confidential in nature about the plans that relate to the management of personnel or the administration of a public body 17(1)(c), or too key in the negotiations carried on by a public body to be released to the 1,277 people who completed the survey 17(1)(e).

Conclusions:

I agree with the Applicant that sub-sections (c) and (e) of s.17(1) do not apply in this case. I've concluded that the polling results themselves have no direct link to the negotiations and do not contain information about actual negotiations carried on by the government. However, as s.17(1) makes clear, the information need not be restricted to the five categories of information found under the section because the list is not exhaustive.

There is some merit to the PSC's position that if the legislators had intended that *background information* would get special treatment under s.17(1) they would have said so, as they did in s.13 and s.14.

In accordance with **Section 45(1)** of the **Act** the burden of proof is on the head of the public body to prove that the Applicant has no right of access to records. The Nova Scotia Court of Appeal in *Chesal v. Nova Scotia (Attorney General) et al*, 2003 NSCA 124, para 38, said 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.

The Federal Court, addressing the question of harm, said:

> At the least there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The Court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. [*Canada (Information Commission) v. Canada (Prime Minister)* (T.D.), [1993]1 F.C.R. 427]

In *Chesal*, Justice Bateman ordered the disclosure of the disputed records after drawing attention to the conclusions reached by Justice Saunders in *O'Connor* (noted above) who observed that the Nova Scotia FOIPOP Act, unlike the legislation in other jurisdictions, requires public bodies to be <u>fully</u> accountable to the public [**Section 2(a)**].

> Thus the FOIPOP Act in Nova Scotia is the only statute in Canada declaring as its purpose an obligation to both ensure that public bodies are fully accountable and to provide for the disclosure of all government information subject only to "necessary exemptions that are limited and specific" . . . Thus it seems clear to me that the Legislature has imposed a positive obligation upon public bodies to accommodate the public's right of access and, subject to limited exception, to disclose all government information so that public participation in the workings of government will be informed, that government decision making will be fair, and that divergent views will be heard.

Justice Saunders concluded that the FOIPOP Act of Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in other provinces and territories.

During the review process I met with officials of the PSC to discuss further it's claim of harm. In my view, the PSC made the case for not disclosing some of the results, but not all.

I disagree with the PSC that questions posed by the polling company contain sensitive information that should not be disclosed. The questions are already in the public domain. They are known to at least the approximately 500 people who the PSC says were polled. In a much different matter, but in the same vein, in *R.v. Van Seters*, the judge held that a tape viewed by everyone in a court room was now in the public domain [*R.v. Van Seters* (1996) O.J. No. 5385 (QL), 31 O,R. (3d) 19 (Gen. Div.)]. These questions have been read by many more people than would fill a court room. In my view there can be no reason under the **Act** to deny them to the Applicant or to anyone else.

I agree with the PSC that disclosing information directly related to collective bargaining would put government at a considerable disadvantage and harm its economic and financial interests. But I have not heard convincing evidence that disclosing more of the polling data would cause such harm.

Recommendations:

(For ease of reference I have numbered the pages for the PSC)

That the PSC disclose, in addition to what it has already disclosed,

- all of the questions (located at the top of the page);
- page 1, with notations removed;
- page 2, with notations removed;
- page 3, with notations removed;
- page 4, with notations removed;
- page 5, with notations removed;
- page 13;
- page 14; and
- pages 32, 33.

Section 40 of the Act requires the Nova Scotia Public Service Commission 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 Public Service Commission is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 2nd day of November, 2004.

Darce Fardy, Review Officer