REPORT **FI-04-46**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of the **OFFICE OF ECONOMIC DEVELOPMENT** to grant partial access to records related to the provincial nomination of immigrants.

REVIEW OFFICER: Darce Fardy

REPORT DATE: March 16, 2005

ISSUE: Whether the exemptions cited by the Office of Economic Development support its decision to deny access to a proposal it received to market an immigration program for Nova Scotia; as well as to other records related to the program.

In a Request for Review, in accordance with the **Freedom of Information and Protection of Privacy Act** *(FOIPOP)*, dated August 12, 2004, the Applicant asked that I recommend to the Office of Economic Development (OED) that it reverse its decision to deny access to the records he asked for.

The Applicant was seeking copies of "(a)ll documents, reports, correspondence and other materials relating to the appointment of Cornwallis Financial Corporation as 'Worldwide Marketing Coordinator for the Nova Scotia Provincial Nominee Program" including a copy of any contract or agreement between the company and the OED.

Background:

Nova Scotia is one of nine provinces and territories that have an agreement with the federal government to play a more direct role in selecting immigrants. According to the Program's website this province is seeking experienced managers with basic literacy skills in English or French and English "to make a financial contribution to a Nova Scotia business and enter into an employment contract with that business." The program is also seeking highly skilled workers with a guaranteed job offer where a transfer of skills to the Nova Scotia workforce is expected.

Nova Scotia signed an agreement with the Cornwallis Financial Corporation, appointing it "program director for the designing, processing and securing of provincial nominees." Among the documents the Applicant asked for is the unsolicited proposal that led to signing an agreement between the OED and the Corporation.

OED's decision:

In accordance with **Section 22** the OED notified the interested third party and asked if it wished to consent to the disclosure of the information sought. It noted five records in particular which contained third party information, including the company's proposal to the Government. The third party objected to the disclosure of the proposal and all its appendices.

The OED found 73 records which were responsive to the Application fourteen of which, including a copy of the agreement reached by the Government and Cornwallis Financial Corporation, were provided to the Applicant in full. For the ease of the Applicant (as well as the Review Office) OED itemized each record, the decision regarding them, and the exemption cited.

The exemptions used by the OED are found in **Sections 12, 13, 14, 15, 16, 20** and **21.**

12 (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

> **(b)** reveal information received in confidence from a government, body or organization listed in clause (a) or their agencies unless the government, body, organization or its agency consents to the disclosure or makes the information public.

13 (1) The head of a public body may refuse to disclose to an applicant information that would reveal the substance of deliberations of the Executive Council or any of its committees, including any advice, recommendations, policy considerations or draft legislation or regulations submitted or prepared for submission to the Executive Council or any of its committees.

(2) Subsection (1) does not apply to

> **(c)** background information in a record the purpose of which is to present explanation or analysis to the Executive Council or any of its committees in making a decision if
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> **(i)** the decision has been made public,
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> **(ii)** the decision has been implemented, or
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> **(iii)** five or more years have passed since the decision was made or considered.

14 (1) The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

(2) The head of a public body shall not refuse pursuant to subsection (1) to disclose background information used by the public body.

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

> **(k)** harm the security of any property or system, including a building, a vehicle, a computer system or a communications system.

16 The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

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.

21 (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

(iii) result in undue financial loss or gain to any person or organization.

During this Office's mediation process the Applicant expressed no interest in the"personal information" of the third party.

The third party's submission to the Review:

The third party's solicitor objected to the disclosure of the proposal that Cornwallis Financial submitted to the Government before the agreement was signed. He argued that it should be denied to the Applicant under the two mandatory exemptions in FOIPOP, Sections 20 and 21.

Information in the proposal, the third party argues, must be withheld from the Applicant because it meets the three-way test under s.21: the proposal contains financial and commercial information of the third party which was provided to the Government [s.21(1)(a)]; it was provided explicitly in confidence as the words "Strictly Confidential" were stamped on the cover of the proposal [s.21(10(b)]; it was also the view of the third party that disclosing the proposal would result in undue loss or gain to the third party and harm its competitive position [s.21(1)(c)(i) and (iii)].

The solicitor pointed out that the business of promoting settlement in Nova Scotia is highly competitive "on a number of different levels": competition among the provinces for immigrants; competition within the provinces for the right to be appointed to assist in the operation and promotion of immigration programs and; competition to obtain reliable and reputable agents in foreign countries.

The third party also argued that disclosing the proposal would give competitors an unfair advantage by revealing the contracted company's cost and fee structure.

The Applicant's submission:

(When the Applicant refers to record numbers, he is using the numbers provided by the OED in its decision.)

The solicitor for the Applicant begins his submission by citing the Nova Scotia Court of Appeal ruling in *O'Connor v. Nova Scotia* (2001), 197 N.S.R. (2d) 154, which noted

that, unlike any similar legislation in the country, FOIPOP expects public bodies to be **fully** accountable to the public.

> Nova Scotia's lawmakers clearly intended to provide for the disclosure of all government information (subject to certain limited and specific exemptions) in order to facilitate informed public participation in policy formulation; ensure fairness in government decision making; and permit the airing and reconciliation of divergent views.

The Applicant then goes on to comment on each of the exemptions cited.

Section 14: The Applicant cites an Ontario Supreme Court case which he feels provides useful analysis of "advice" [*Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner*) 2004 CarswellOnt 189 (Ont.S.C.J)]. The Applicant argued "[t]he Court found that an overly broad interpretation of the term "advice" would eviscerate the fundamental purposes of the FOIPOP Act to provide a right of access to information under the control of institutions."

The Applicant said the court determined that the following information could not be interpreted as "advice" or "recommendations":

I. Factual information

II. Background information

III. Analytical information

IV. Evaluative information

Although the Applicant does not know what information is being denied under s.14, he cautions the OED not to apply the exemption if it is not an "explicit, suggested course of action to be accepted or rejected by its recipient."

Section 12(1)(b): The Applicant believes that Record 6 which contains a list of existing provincial nominee agreements, and was withheld by the OED, probably contains information already made public by the other provinces. Court cases have established that this exemption should not apply to information from other governments that are part of the public record in those provinces. [*Chesal v. Nova Scotia (Attorney General)* (2002), 211 N.S.R. (2d) 321, *Air Atonobee v. Canada (Minister of Transport)* (1998) 27 F.T.R. 194 (F.T.D.)]

Section 21: The Applicant contends that disclosing the proposal or records about the proposal cannot significantly harm the competitive position of the contracted company, or result in undue financial loss, because the contract has already been awarded.

He also cited the Government's own "Guide to the Submission & Evaluation of Unsolicited Proposals" to demonstrate why the third party had no reason to expect that its proposal would not be considered for disclosure under FOIPOP. The Applicant quoted a section of the Guide:

> Once approved and a contract is established, unsolicited proposals submitted to the Province become the property of the Province and are subject to the Nova Scotia Freedom of Information and Protection of Privacy Act (FOIPOP). By entering into a contract with the Province the proponent thereby agrees to public disclosure of the contents of their unsolicited proposal. Any information in the unsolicited proposal the proponent considered to be proprietary should be marked as "confidential", and will be subject to

> appropriate consideration as defined within the Nova Scotia Freedom of Information and Protection of Privacy Act.

The Applicant concluded that "(i)t is clear from a review of this document that it is fully anticipated that a FOIPOP request will result in the release of unsolicited proposals as well as evaluation review and assessment materials, unless the information can be appropriately characterized as proprietary in nature."

OED's submission:

The OED feels it fulfilled its obligation under the FOIPOP to be "fully" accountable when it disclosed the signed contract.

Section 21: The OED supports the submission of the third party.

Section 12: The OED said the advice and views it received from other governments, before signing the *Canada-Nova Scotia Agreement on Provincial Nominees* was denied because it was received in confidence and was less than 15 years old.

The governments in question were not consulted because of the low probability that they would consent to disclosure, and because so many of them (seven provinces and the federal government) were asked for advice and because of "the difficulty identifying the precise source of each recorded comment."

Section 13: Although the records related to deliberation of the Cabinet were denied, all of the background information was provided in Record #36.

Section 14: The OED submits that it has applied this exemption only to advice that suggests a course of action.

Other parts of the submission to the Review contain information that has been withheld from the Applicant. I am not in a position to disclose it.

Conclusions:

I am grateful to all parties for the completeness of their submissions to the Review.

Under **Section 35** I have been provided with copies of all of the records; those denied, those denied in part, and those given to the Applicant in their entirety.

Section 45(1) lays the burden of proof, during a review or appeal, on a public body to prove that the applicant has no right of access to the records he requested.

A precis of my comments on the above exemptions in earlier Reviews may be helpful.

Section 21: A finding in my Review FI-03-54, determined that the public body had not "provided proof that disclosure of the proposal would reasonably be expected to 'harm significantly' the interests of the third party." I cited the Nova Scotia Court of Appeal decision *(Chesal)* in which the judge considered the phrase "could reasonably be expected to harm significantly" and said:

> In reading the FOIPOP Act as a whole, and considering the interpretation by this Court particularly in *O'Connor*.supra, I have concluded 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. [*Chesal v. Attorney General of Nova Scotia,* (2003) NSCA 124]

In *Fuller v. R et al. v. Sobeys (2004) NSSC 86,* Justice Pickup cited *Lavigne v. Canada (Officer of the Commissioner of Official Languages*), (2002) S.C.C. 53 at paragraph 58 which held that to establish a reasonable expectation of harm:

> ...There must be a clear and direct connection between the disclosure of specific information and the injury that is alleged. The sole objective of non-disclosure must not be to facilitate the work of the body in question*;* there must be professional experience that justifies non-disclosure.

In *Chesal* Justice Bateman cites Justice Saunders' interpretation of Section 2(a), in *O'Connor*, which addresses the purpose of *FOIPOP* "to ensure public bodies are <u>fully</u> accountable (emphasis added) to the public":

> 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 <u>limited</u> exception (emphasis added), 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. [O'Connor v Nova Scotia, (2001) NSCA 132]

In this case I agree with the Applicant that in view of the Government's policy on unsolicited proposals, which the one in question here is because there was no "Request for Proposals," the third party has no reason to expect its proposal would not be subject to FOIPOP, regardless of whether it is marked "confidential."

On the matter of 'harm' to the interests of the third party, I have concluded that I have seen no direct connection between disclosure and the harm alleged.

I must now determine whether any parts of the proposal can be denied under the other exemptions which were claimed by the OED.

Sections 13 and 14: Review FI-03-11, cited several court cases that discussed both exemptions (s.13 and s.14) involving advice. In *O'Connor* Justice Saunders said:

> The description or heading attached to a document will not be determinative. The hyperbole accompanying speeches or press releases will not be decisive. There is no shortcut to inspecting the information for what it really is and then considering the required analysis under s.13 to see if its disclosure would enable the reader to infer the essential elements of Cabinet deliberations.

In the same case, the Court said that even if s.13(1) applies, if a record contains "background" information [s.13(2)], then that background information must be disclosed whether or not it contains information subject to s.13(1). Section 3(1)(a) of the Act defines "background information" to include any factual material, a feasibility or technical study, and a plan or proposal to establish a new program or change a program, if the plan or proposal has been approved or rejected by the head of the public body. Section 24 of the Regulations further defined some elements of "Background Information"

> **24 (1)** For the purpose of subclause 3(1)(a)(i) of the Act, "factual material" means a coherent body of facts, separate and distinct from interpretations of, reactions to or advice and recommendations in respect of facts.
>
> **(6)** For the purpose of subclause 3(1)(a)(ix) of the Act, "feasibility study" means a study, the fundamental purpose of which is to advise a public body on the practicability of a specific proposed project, that includes an evaluation of whether the project, or specific proposals for that project, are capable of being accomplished with a reasonable assurance

of success and in accordance with established standards including specified financial limits.

My Review FI-02-84 I addressed "advice" at length:

> „„, I have adopted definitions of "advice" used by the Alberta and Ontario Information and Privacy Commissioners. Alberta's Commissioner defined it as "an opinion, view or judgement" based on the knowledge and experience of an individual and expressed to assist the recipient to act and, if so, how. (Order 97-007)
>
> Ontario's Commissioner accepted "thoughts" and "views" if they lead to a course of action. (Order M-457)
>
> In my view "advice" should be interpreted in a way that a reasonable person would understand the word to mean and, in my view, that's what the Alberta and Ontario Commissioners have done. The Nova Scotia Court of Appeal said such words as "advice" should be given their "ordinary meaning". [*McLaughlin v. Halifax- Dartmouth Bridge Commission* (1993) 125 NSCA]. The Federal Court has said public bodies "must choose the interpretation that least infringes on the public's right of access". [*Canada (Information Commissioner) v. Canada (Immigration and Refugee Board*) (1997) (Emphasis added)].

For s.13 to stand the OED must prove that the denied information contains the "substance of deliberations" of the Cabinet. That phrase is not defined in the FOIPOP Act. In my Review FI-02-24 I cited the reference to this phrase in *O'Connor*.

> Justice Saunders said the question to be asked in determining if a document contains the substance of deliberations of the Executive Council is: "Is it likely that the information would permit the reader to draw accurate inferences about cabinet deliberations? He said there was "no need to give a broad, expansive definition to 'substance of deliberations'."

The OED did not address "substance of deliberations" in its submission.

I've concluded that s.13 and s.14 are properly applied to some records or parts of records, but not all.

Section 12(1)(b): In my Review FI-03-51, I noted that *Chesal* cited a ruling of the British Columbia Information and Privacy Commissioner.

With respect to clause (b), the British Columbia Information and Privacy Commissioner, in Order 361, provided factors to be considered when determining whether or not information was received in confidence. They include:

1. What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?

2. Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?

3. Was the record in question explicitly stated to be provided in confidence?

4. Was there an agreement or understanding between the parties that the information would be treated in confidence?

5. Do the actions of the public body and the supplier of the record - including after the supply - provide objective evidence of an expectation of or concern for confidentiality?

The B.C. Commissioner said that in general it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated.

I am not satisfied that s.12(1)(b) was properly applied to all records.

Section 15(1)(k): Only one record has information denied under this exemption. It is obviously a cell phone number of an individual. I'm not convinced that this exemption covers a cell phone number and I've received no evidence that it does. However a telephone number is among the definitions for "Personal Information" in Section 3(1)(i). This number can be denied under s.20.

Section16: McNairn and Woodbury, in *Government Information: Access and Privacy,* wrote:

> In determining the scope of solicitor-client privilege for the purposes of access legislation, the courts have generally applied the common law principles relating to solicitor-client privilege, Therefore, the exemption from disclosure for information protected by solicitor-client privilege is interpreted broadly, in favour of confidentiality.

I am satisfied that the information denied under s.16 is privileged.

Recommendations:

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

From Record #1: Pages 3 -5 headed "Proposal - Provincial Apprenticeship Nominee Program:"; page 9 titled "Why Cornwallis? - Summary" to the midway of page 10 ending the section titled "International Focus;"

Record #3: The first sentence of the e-mail;

Record #4: The entire first paragraph;

Record #5: The entire first paragraph of the e-mail;

Record #6: Those parts denied under s.12 and s.14;

Record #13: The 4th and 5th paragraphs of the memo dated December 7, 2000.

Record #14: The entire e-mail;

Record #16: The 17 questions and answers;

Record #19: The parts denied under s.21 and s.12;

Record #20: The Summary and Background;

Record #22: The Summary and the Background;

Record #23: The entire letter;

Record #28: The entire Summary;

Record #31: The Summary and the Background

Record #34: The Summary and the Background;

Record #35: The Summary and the Background;

Record #36: The Summary and the Background of the Memorandum and from the Briefing Note, the Background; and the entire "Summary of Cornwallis Financial Proposal;

Record #37: The Summary and the Background of the Memorandum and the Cornwallis Summary;

Record #38: Paragraph 3;

Record #39: Section 3 on page 2;

Record #54: The entire record.

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

Dated at Halifax, Nova Scotia this16th day of March, 2005.

Darce Fardy. Review Officer