

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

A **REQUEST FOR REVIEW** of a decision of the **OFFICE OF HEALTH PROMOTION** to deny access in whole or in part to records related to discussions being held about the future of gaming in the province of Nova Scotia.

REVIEW OFFICER: Darce Fardy

REPORT DATE: February 1, 2005

ISSUE: Whether Section 14 of the *FOIPOP* Act supports the Department's decision to sever some of the records being providing them to the applicant.

In a Request for Review pursuant to the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), dated November 11, 2004, the Applicant asked that I recommend to the Office of Health Promotion (OHP) that it reverse its decision to sever the records requested. He also asked that I review the fees charged but that issue was resolved outside the Review process.

The Applicant wanted copies of all e-mail exchanged within the OHP and between the OHP, the Department of Finance and the Nova Scotia Gaming Corporation “related to the preparation of the public consultation on gaming in Nova Scotia and the preparation of the document entitled *‘New Directions for Gaming in Nova Scotia’*.”

The Department told the Applicant it was granting his request in part but was denying some records in whole or in part under exemptions found in Sections 13(1), 14(1) and 20(1). The Applicant subsequently stated that he had no interest in the personal information withheld under s. 20(1).

During mediation, the OHP disclosed more of the information originally denied. Forty-two records, denied in whole or in part, are in dispute and the subject of this review. Only one record is withheld under s.13(1).

Section 14(1) which was used on most of the information denied, allows a public body to refuse to disclose information “that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.”

Section 13(1) provides a discretionary exemption for 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.”

The submission of the OHP:

The OHP believes that the information withheld under s.14(1) clearly provides advice to the Minister or a public body (OHP and the Nova Scotia Gaming Corporation are the public bodies involved) on what should and should not go into the paper being prepared.

OHP cites McNairn and Woodbury’s *Government Information - Access and Privacy* which in turn cites a decision of the British Columbia Court of Appeal that “advice” should be

interpreted “to include an opinion that involves exercising judgement and skill to weigh the significance of matters of fact; therefore, it includes expert opinions on matters of fact on which an institution must make a decision for future action.” (*College of Physicians and Surgeons (British Columbia) v. British Columbia (Information and Privacy Commissioner)*, [2003] 2 W.W.R. 279)

The OHP said that “in some of the e-mails it was difficult to separate factual elements from an expression of opinion and in these instances the Office of Health Promotion used its discretion in severing the information.”

One record was withheld under s.13(1) because it is a draft related to a presentation to the Social Policy Committee of the Executive Council.

Conclusions:

Use of discretion:

The Alberta Information and Privacy Commissioner (*Order 2000-021*) provided some factors to be considered by a public body when considering a discretionary exemption, including:

- the general purposes of the Act;
- the nature of the record and the extent to which it is significant or sensitive to a public body;
- whether disclosure will increase public confidence in the public body; and
- whether there is a definite and compelling need to release the record.

The Alberta Government’s manual on access to information makes it clear that “[a] public body must not replace the exercise of its discretion with a blanket policy that certain types of information will not be released.”

I am satisfied that OHP exercised its discretion on this application in a demonstrable and reasonable way.

It is obvious that OHP fulfilled its responsibility to diligently balance openness and accountability with the need to encourage candid advice and proposals for its discussion paper on gaming in Nova Scotia.

Advice:

I have no quarrel with the OHP's definition of "advice" although no definition is provided in *FOIPOP*. Subsection 14(2) states that a public body "shall not refuse pursuant to subsection (1) to disclose background information used by the public body." "Background information" is defined in **Section 3(1)(a)** and this definition is refined in Section 24 of the *Regulations*. The records contained no significant "background information" that has not already been disclosed.

Having read carefully the forty-two records at issue, I have concluded that the OHP's decision on this application is supported by the discretionary exemptions found in s.14(1) and s.13(1).

Recommendation:

That the Department confirm its decision in writing to the Applicant.

Dated at Halifax, Nova Scotia this 1st day of February, 2005.

Darce Fardy, Review Officer